

THE POLICY OF THE UNITED STATES TOWARDS INDUSTRIAL MONOPOLY

BY

OSWALD WHITMAN KNAUTH, B. A.,

Instructor in Economics, Princeton University

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS

FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

IN THE

FACULTY OF POLITICAL SCIENCE

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BY

OSWALD WHITMAN KNAUTH

To

THE MEMORY OF MY FATHER

PERCIVAL KNAUTH

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PREFACE

THE policy of the United States is determined by three agencies: by Congress, in the enactment of laws; by the Executive, in the administration of these laws, and in the advice it gives to Congress; and by the Supreme Court, in the interpretation of the laws. Behind, and overshadowing these, is that vague but powerful force known as public opinion; that, however, must be expressed in acts through one of the three agencies.

Towards the formation of a policy in regard to industrial monopoly, each of these branches of the government has exerted an influence. The present work describes the history of the policy of each of these branches, and then analyzes them as a whole, with a view to explaining what has been, and what is, the policy of the United States towards a number of specific questions relating to industrial monopoly.

No attempt is made at this time to analyze the problem presented by industrial monopoly. The important practical question to-day is the attitude of the government towards monopoly, and it has been deemed wisest to interpret it, as far as possible, in a purely objective manner.

For the reason that no policies have been announced since the beginning of the administration of President Wilson, and because the administration of President Taft may now be viewed as a whole, this study ends with his term of office, on March 4th, 1913.

It seems probable that several governmental policies may undergo changes in the near future. Should this book give the reader a clearer understanding, in the light of history, of the policies to be adopted during the present administration, its purpose will be accomplished.

I acknowledge with gratitude the help received from many kind friends, and from many who are strangers. Especially am I indebted to Professor Henry R. Seager, of Columbia University, who has aided and criticised the work at every stage; to Professor Edwin R. A. Seligman, of Columbia University; to Professor David R. McCabe, of Princeton University; and to my uncle, Mr. Antonio Knauth. To my brother, Arnold W. Knauth, my thanks are due for much help in the preparation of the manuscript and in the proof-reading.

O. W. K.

NEW YORK CITY, *October 4th, 1913.*

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CHAPTER I

THE FORMATION OF A POLICY

THE movement towards the formation of industrial monopolies in the United States was inaugurated by the formation of the Standard Oil Trust in 1882.¹ This was followed a few years later by the formation of combinations in several other industries, chief of which were the trusts in the sugar, cottonseed oil, whiskey and bee industries.

In addition to these, looser agreements in the form of selling pools were quite common throughout the industries of the country. Mr. Henry D. Lloyd, as early as 1884,² asserted that all the industries of the country were governed by combinations of one sort or another. In 1888, a commission in New York State³ examined into the workings of a number of combinations, and reported the existence of a large number of others, a complete investigation of which, they asserted, would necessitate their permanent removal to New York City. And in the same year, the committee of the United States

¹The name "Trust" applies properly to the form of combination then employed. This consisted of the surrender of the stocks of the subsidiary companies to certain trustees who issued in exchange "Trustees' Certificates." This form of combination was declared illegal in the early nineties, and since then the name "Trust" has been loosely applied to any large combination. It is in this general sense that the word will be used during this study.

²*North American Review*, vol. 138, p. 535.

³*New York State Reports*, 1888.

Senate reported "that the number of combinations and trusts formed and forming in this country is, as your committee has ascertained, very large, and affects a large portion of the manufacturing and industrial interests of the country. They do not report any list of these combinations for the reason that new ones are constantly forming and that old ones are constantly extending their relations so as to cover new branches of business and invade new territories."¹

Important in shaping public opinion during the late eighties were the host of articles on the subject of monopolies with which the magazines were flooded. They were almost unanimously of a character to arouse popular fear of the new form of industrial organization which at this time was being adopted. As Mr. George Gunton in 1888 expressed it: "Indeed, the public mind has begun to assume a state of apprehension, almost amounting to alarm, regarding the evil economic and social tendencies of these organizations."² The very titles of the articles were sufficient to account for this; "Modern Feudalism,"³ "The Moloch of Monopoly,"⁴ "The Bugbear of Trusts,"⁵ "Dangerous Trusts,"⁶ are but typical of many.

The first official response to the general agitation was the appointment, in 1888, in New York State, of a commission to investigate the question. From an extensive, though hasty, investigation, the commission came to some striking conclusions. They declared:

¹ *House Rept.*, No. 4165, March 2, 1889, 50th Congress, 2nd session.

² *Pol. Sci. Quarterly*, Sept., 1888, vol. iii., p. 385.

³ *North Am. Rev.*, March, 1887, by J. F. Hudson.

⁴ *Forum*, June, 1889, by Wm. Barry.

⁵ *Ibid.*, July, 1888, by Henry Wood.

⁶ *North Am. Rev.*, May, 1888, by W. M. Rapsher.

For, however different the influences which give rise to these combinations in each particular case may be, the main purpose, management and effect of all upon the public is the same, to-wit: the aggregation of capital, the power of controlling the manufacture and output of various necessary commodities; the acquisition or destruction of competitive properties, all leading to the final and conclusive purposes of annihilating competition and enabling the industries represented in the combination to fix the price at which they would purchase the raw material from the producer, and at which they would sell the refined product to the consumer. In any event, the public at each end of the industry (the producer and consumer) is, and is intended to be, in a certain sense, at the mercy of the syndicate, combination or trust.¹

The immediate result of the investigation was the filing of a suit in August, 1888, against the North River Sugar Refining Co. for abusing its charter, and against the Sugar Trust, on the ground that it was a monopoly and had usurped franchises. The decision handed down on June 24th, 1890, by the New York State Court of Appeals, revoked the charter of the company, on the ground that it had violated it, and had failed in the performance of its corporate duties, adding that a corporation must remain single, as created.²

Another evidence of the growth of public opinion at this time is to be found in the platforms of the political parties. In 1884, largely as a result of the granger movement, was formed the new anti-monopoly party with Benjamin F. Butler as its nominee for President. The same man was also the nominee of the Greenback and the Prohibition parties. All these parties, besides denouncing

¹ *New York State Reports*, 1888

² 121 N. Y. 582.

railways, pools and monopolies in general, also condemned the giant corporations, and demanded legislation to restore to the people what monopolies had usurped. While the small significance of the movement at this time is shown by the total vote cast for Butler of only 175,000, it nevertheless marked the beginning of the recognition by politicians of the growing popular demand.

In this year there was no mention of the corporation problem in the Republican platform, and the very cautious section in the Democratic platform:

While we favor all legislation which will tend to the equitable distribution of property, to the prevention of monopoly, and to the strict enforcement of individual rights against corporate abuses, we hold that the welfare of society depends upon a scrupulous regard for the rights of property as defined by law.

Thus the trust problem in 1884 may be dismissed as of no national importance.

A great change, however, is to be noted in the next presidential campaign. Uncertainty had been replaced by certainty, and the issues of the minor parties had become the issues of the major ones. The Republican platform of 1888 came out clearly with

We declare our opposition to all combinations of capital, organized in trusts or otherwise, to control arbitrarily the condition of trade among our citizens, and we recommend to Congress and the State Legislatures in their respective jurisdictions, such legislation as will prevent the execution of all schemes to oppress the people by undue charges on their supplies, or by unjust rates for the transportation of their products to market.

The Democrats were no less precise in their platform, declaring that

the interests of the people are betrayed when, by unnecessary taxation, trusts and combinations are permitted to exist which, while unduly enriching the few that combine, rob the body of our citizens by depriving them of the benefits of natural competition.

The unanimity of both parties in their purpose of preventing the existence of monopoly, on account of the harm done to the people, is clear evidence of the extent to which popular opinion had been aroused.

In this same year President Cleveland mentioned the great power that had been attained by certain corporations, and urged a reduction of the tariff.¹ In the following year, 1889, President Harrison called for more direct legislation to stamp out monopolies:²

Earnest attention should be given by Congress to a consideration of the question how far the restraint of those combinations of capital commonly called "trusts" is a matter of federal jurisdiction. When organized, as they often are, to crush out all healthy competition and to monopolize the production or sale of an article of commerce and general necessity, they are dangerous conspiracies against the public good, and should be made the subject of prohibitory and even penal legislation.

In the meantime Congress was taking preparatory steps. Its first move was a resolution introduced into the House on January 4th, 1888, by Mr. Mason, instructing the committee on manufactures to investigate into the subject and make a report. After considerable debate, this was passed on January 25th, 1888.

This committee³ examined into the operations of the

¹ Richardson, *Messages and Papers of the Presidents*, vol. viii, p. 774.

² *Ibid.*, vol. ix, p. 43.

³ *H. Rept.*, no. 3112, 50th Congress, 1st session, and *H. Rept.*, no. 4165, 50th Congress, 2nd session.

Standard Oil Company, the Sugar Refineries Company, the Cottonseed Oil Trust, the Whiskey Trust and the Beef Trust. Owing to a difference of opinion on the part of its members, it confined itself to a report of the testimony, which it recommended to the careful perusal of the House. The investigations of the committee were hampered through its inability to force witnesses to appear, to testify when they did appear, or to verify statements by an examination of the books of the company. Considering all these disadvantages, its success in unearthing the workings of trusts was remarkable, and of great value in clarifying opinions previously based on rumor. It gave to Congress a foundation of fact on which to form its laws, and contributed greatly in concentrating thought on the remedies for the situation.

And on May 1st, 1890, a select committee of the Senate, reporting on the transportation and sale of meat products, recommended the passage of the anti-trust bill as finally reported by the judiciary committee of the Senate.¹

A detailed description of the debates which occurred in Congress prior to the passage of the Sherman act is in many ways instructive in determining the opinions and desires which actuated that body. A number of members presented their views, so that from the cumulative evidence thus obtained, some general purposes may be ascertained.

Too much emphasis, however, should not be placed on the value of these debates. Justice Peckham later summed up the situation in this way:

Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would

¹ *Sen. Rept.*, no. 829, 51st Congress, 1st session.

be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. . . . All that can be determined from the debates and reports is that various members had various views.¹

This, on the other hand, is rather an extreme statement. The debates have some value to the student of the Sherman act; and they should be studied with a view to discovering wherein they showed sufficient unanimity to give a clue to the policy desired by Congress.

Already, in 1888, several bills intended to regulate the growing combinations in industry had been introduced in the Senate,² and, in the early part of 1889, were on several occasions the subject of discussion in that body.³ But although a number of aspects of the question were at this time touched on, and general approval of some sort of legislation to regulate the trusts and combinations was apparent, the matter was allowed to drop, after the severe indictment by Senator George of Mississippi, of the proposals then under discussion, on the grounds of unconstitutionality and inadequacy.

On December 4th, 1889, Senator Sherman, of Ohio, introduced in Congress "A Bill to declare unlawful, trusts and combinations in restraint of trade and production."⁴

¹ The Freight Association case, 166 U. S. 318.

² *Cong. Rec.*, 50th Congress, 1st sess., S. 2906, S. 3440, S. 3445, and S. 3510.

³ *Ibid.*, 50th Congress, 2d sess., pp. 1120-1121, 1167-1169, 1457-1462.

⁴ *Ibid.*, vol. 21, p. 1765, 51st Cong., 1st sess., S. 1. The bill was as follows:

Sec. 1. That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in

This bill declared void arrangements or combinations of any sort, between persons or corporations, which tended to prevent free competition, or which advanced the price of any article imported into the United States or produced and sold in the United States, when it was transported from one state into another. And it provided for a civil remedy for persons injured by such combinations, and for criminal punishment for persons connected in any manner with such combinations. It was reported from the finance committee by Senator Sherman on January 14th, 1890, and was first considered by the Senate on February 27th. At this time Senator

the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States, or which shall be transported from one State or Territory to another, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, designed or which tend to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful and void.

Sec. 2. That any person or corporation, injured or damnified by such arrangement, contract, agreement, trust, or combination, may sue for and recover in any court of the United States of competent jurisdiction, of any person or corporation a party to a combination described in the first section of this act, the full consideration or sum paid by him for any goods, wares and merchandise included in or advanced in price by said combination.

Sec. 3. That all persons entering into any such arrangement, contract, agreement, trust, or combination, described in section 1 of this act, either on his own account or as an agent or attorney for another, or as an officer, agent or stockholder of any corporation, or as a trustee, committee or in any capacity whatever, shall be guilty of a high misdemeanor, and on conviction thereof in any district or circuit court of the United States, shall be subject to a fine of not more than \$10,000, or to imprisonment in the penitentiary for a term of not more than five years, or both such fine and imprisonment, in the discretion of the court. And it shall be the duty of the District Attorney of the United States of the district in which such persons reside, to institute the proper proceedings to enforce the provisions of this act.

George, of Mississippi,¹ made a long speech on the constitutionality and the efficiency of this measure. He declared it to be unconstitutional, on the ground that it did not differentiate between interstate and intrastate commerce, and inefficient, on the ground that it did not prohibit agreements made in foreign countries. As a result of this speech the bill was recommitted to the finance committee.

On March 21st, Senator Sherman reported a new bill from the finance committee. This bill prohibited only combinations entered into by persons or corporations of different states, or of the United States and foreign countries. Moreover, it gave to district courts original jurisdiction in enforcing the prohibitions of the bill, providing a remedy of double damages to any persons injured by such combinations. And it removed the criminal clause of the original bill.²

¹ *Cong. Rec.*, 51st Congress, 1st sess., p. 1765.

² *Cong. Rec.*, vol. 21, 51st Cong., 1st sess., p. 2455.

Section 1. That all arrangements, contracts, agreements, trusts, or combinations between two or more citizens or corporations or both, of different States, or between two or more citizens or corporations, or both, of the United States and foreign states, or citizens or corporations thereof, made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or with a view or which tend to prevent full and free competition in articles of growth, production or manufacture of any State or Territory of the United States with similar articles of the growth, production, or manufacture of any other State or Territory, or in the transportation or sale of like articles, the production of any State or Territory of the United States into or within any other State or Territory of the United States; and all arrangements, trusts, or combinations between such citizens or corporations, made with a view or which tend to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void. And the circuit courts of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, and to issue all remedial process, orders, or writs

In presenting this new measure, Senator Sherman made a speech on the subject of trusts, in which he so clearly expressed his economic views, that it is well to examine them.

After stating that he expected liberal interpretation by the courts, he said

This bill does not seek to cripple combinations of capital and labor; the formation of partnerships or corporations; but only to prevent and control combinations made with a view to prevent competition or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer.¹

But he stated no tests of this difference, apparently relying on the courts to "distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade." Then he went on to speak of the wrongdoing of associated capital which was not satisfied with partnerships or corporations competing with each other and had invented a new form of combination commonly called "trust" that sought to avoid competition. He then described the evils which such concentration of power entailed, quoting from the speech of Senator George, which he said so well described the situation, that he read it as his own.

proper and necessary to enforce its provisions. And the Attorney-General and the several district attorneys are hereby directed, in the name of the United States, to commence and prosecute all such cases to final judgment and execution.

Section 2. That any person or corporation injured or damaged by such arrangement, contract, agreement, trust, or combination defined in the first section of this act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, twice the amount of damages sustained and the cost of the suit, together with a reasonable attorney's fee.

¹ *Congr. Rec.*, 1890, vol. 21, p. 2456.

These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessities of life and business and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy, and increase the price of what they sell. They aggregate to themselves great enormous wealth by extortion, which makes the people poor. Then, making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of peculation under the law, till they are fast producing that condition of our people in which the great mass of them are servitors of those who have this aggregated wealth at their command.¹

After arguing for the constitutionality of the present measure, he closed with the statement

And, sir, while I have no doubt that every word of this bill is within the powers granted to Congress, I feel that its defects are in its moderation, and that its best effect will be a warning that all trade and commerce, all agreements and arrangements, all struggles for money or property, must be governed by the universal law that the public good must be the test for all.²

Senator Vest of Missouri was the next speaker, saying

Mr. President, no one can exaggerate the importance of the question before the Senate, or the intensity of feeling which exists in the country in regard to it. I take it, there will be no controversy with the Senator from Ohio as to the enormity of the abuses that have grown up under the system of trusts

¹ *Congr. Rec.*, 1890, vol. 21, p. 2461.

² *Ibid.*, p. 2462.

and combinations which now prevail in every portion of the Union.¹

He thereupon argued that the present measure was unconstitutional, and hoped it would be referred to the judiciary committee for further consideration. And he closed with the emphatic declaration that the only real remedy for the trust problem lay in the reduction of the tariff. In proof of this, he brought forward many letters and statistics.

Senator Hiscock, of New York, also stated that he sympathized with Senator Sherman, and was willing to join with him in every effort that promised to defeat trusts and combinations. Senator Reagan, of Texas, next stated that he agreed with the objects of the bill, but considered it in its present form unconstitutional and inefficient. Senator Allison next in vigorous language denied all connection between the tariff and the trusts, with the exception of the Sugar Trust and the Steel Rail Combination.

Senator Teller, of Colorado, closed the debate for the day, giving a statement of the wrongs of the trusts:

There is not a civilized country anywhere in the world that is not more or less cursed with trusts. A trust may not always be an evil. A trust for certain purposes, which may simply mean a combination of capital, may be a valuable thing to the community and to the country. There have been trusts in this country that have not been injurious. But the general complaint against trusts is that they prevent competition.²

But he did not consider the present bill strong enough to attain the desired result, and then went on to show that the tariff was not related to the rise of trusts.

¹ *Congr. Rec.*, 1890, vol. 21, p. 2463.

² *Ibid.*, p. 2471.

The debate re-opened on March 24th with a speech by Senator Turpie, of Indiana. He said, "The purpose of the bill of the Senator from Ohio is to nullify the agreements and obligations of the trusts; of these fraudulent combinations. I favor it. There is another purpose, to give to parties injured a civil remedy in damages for injury inflicted. I am in favor of that."¹ Having thus stated his views, he then spoke of the aid he expected to be given by the favorable construction of the courts. Senator Pugh, of Alabama, next spoke of the "magnitude and the oppressive and merciless character of the evils resulting directly to consumers,"² and indorsed the propriety of the original Sherman bill in stopping this evil. Hereupon, Senator Reagan³ offered his addition to the Sherman bill, which made connection of any sort with a trust a criminal offense, and liable to a fine and imprisonment; and which defined a trust as a combination of capital, skill or acts, for the purpose of creating a restriction in trade, limiting production or increasing prices, preventing competition, fixing a standard price, creating a monopoly, contracting not to enter an industry, or to enter an agreement whereby prices are affected. A general debate ensued on these proposals, during which objection was brought out against the criminal features, especially since it was agreed⁴ that the bill at present included farmers' and workmens' associations.

Senator Stewart, of Nevada, at this time, made the only speech in the Senate adverse to the spirit of the Sherman bill.⁵ He insisted that combination was a necessary element in modern life, illustrating his point by reference to the failure of England to carry out such

¹ *Congr. Rec.*, 1890, vol. 21, p. 2556.

² *Ibid.*, p. 2558.

³ *Ibid.*, p. 2560.

⁴ *Ibid.*, p. 2561.

⁵ *Ibid.*, pp. 2564 *et seq.*

laws. The only means by which such combinations could be regulated, he concluded, was by counter combinations on the part of the people.

The next speaker was Senator Hoar, who criticised the bill sharply, on the ground that at present it included but a very small part of the offenses of combinations, and that it failed to give a proper remedy to those injured by combinations.¹ Hereafter ensued further criticisms of the ineffectiveness of the proposed bill, especially on the part of Senators Vest, Hiscock, and Teller.

The debate was resumed on March 25th, as in committee of the whole.

Senator George pointed out in emphatic language the importance of the subject before them. "It is a sad thought to the philanthropist that the present system of production is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises." And then he inquired "Is production, is trade, to be taken away from the great mass of the people and concentrated in the hands of a few men who, I am obliged to add, by the policies pursued by our government, have been enabled to aggregate to themselves large enormous fortunes?"²

He then moved the reference of the original bill and all the proposed amendments to the judiciary committee.³ This, however, was objected to by a number of speakers, on various grounds; especially by Senator Reagan, who desired his addition to be voted on by the Senate, and by Senators Wilson, Sherman and Pugh who feared such a move would prolong the time of the pas-

¹ *Congr. Rec.*, 1890, vol. 21, pp. 2567 *et seq.*

² *Ibid.*, p. 2598.

³ *Ibid.*, p. 2600.

sage of any bill. And Senator Stewart again objected to the passage of the bill, on the ground that it took away "the sacred right of coöperation."¹ Next, Senators Platt and Morgan advocated the reference, on the ground that the present bill was entirely ineffective. And when the vote was taken, it was found that the motion was lost, 15 yeas against 28 nays.²

Thereupon, a vote was taken on adding the Reagan amendment to the Sherman bill; this was carried, by 34 yeas against 12 nays.

The Senate at this time agreed to an amendment offered by Senator Sherman,³ to add to Section 1 a proviso excluding from the ban of the act combinations of labor, agriculture or horticulture. It then agreed to a number of amendments offered by different Senators; by Senator Reagan,⁴ permitting suits to be brought in state as well as federal courts; by Senator Hoar,⁵ to apply the act to combinations of persons or corporations of the same state, if they prevent free competition; by Senator Ingalls, preventing dealings in options and futures, by laying burdensome taxes and conditions on these privileges.⁶ Next, Senator Coxe, of Texas, offered an amendment to all the bills proposed, except that of Senator Ingalls.⁷ This bill described and denounced trusts, and forbade the transportation of articles pro-

¹ *Congr. Rec.*, 1890, vol. 21, p. 2606.

² *Ibid.*, p. 2611.

³ *Ibid.*, p. 2611. "Provided, that this act shall not be construed to apply to any arrangements, agreements or combinations between laborers, made with the view of lessening the number of hours of labor, or of increasing their wages; nor to any arrangements, agreements, or combinations in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products."

⁴ *Ibid.*, p. 2612.

⁵ *Ibid.*, p. 2613.

⁶ *Ibid.*, p. 2613.

⁷ *Ibid.*, p. 2614.

duced by a trust in one state into other states; moreover, it gave to the President the power of suspending the tariff on any articles manufactured by a trust. However, it was defeated by a vote of 26 to 16.¹

During the debate on March 26th, two amendments of importance were added. The first of these was that proposed by Senator Spooner,² giving to the court the power of issuing an injunction against all persons connected with a trust, forbidding them to carry on the business, and applying severe remedies. After a lengthy debate, this was agreed to.³ The second was an addition to section 1, proposed by Senator Aldrich,⁴ providing that the act should not apply to combinations which, by means other than a reduction of wages, lowered the cost of production or prices of any necessities of life, or increased the earnings of any persons engaged in useful employments. This also was agreed to.

Hereafter a number of additions to the articles in which "futures" were prohibited were passed, to such an extent as to justify Senator Sherman's outbreak⁵ that "the amendments which have been put upon this bill in the last few minutes are such as simply bring it into contempt, and the manner in which this has been done tends to bring the whole bill into contempt."

Despite this, more minor amendments were proposed, some of which were agreed to and others rejected, until, on March 27th, the bill was reported from the committee of the whole,⁶ and the amendments considered by the Senate. In connection with the amendment to exclude from the ban of the act combinations of laborers, farmers

¹ *Congr. Rec.*, 1890, vol. 21, p. 2615.

² *Ibid.*, p. 2652.

³ *Ibid.*, p. 2655.

⁴ *Ibid.*, p. 2640.

⁵ *Ibid.*, p. 2655.

⁶ *Ibid.*, p. 2723.

and horticulturists, Senator Edmunds expressed his views at some length.

I am in favor, most earnestly in favor, of doing anything that the Constitution of the United States has given Congress power to do, to repress and break up and destroy forever the monopolies of that character, [*i. e.*, Sugar Trust and Standard Oil] because in the long run, however seductive they may appear in lowering prices to the consumer, for the time being, all human experience and all human philosophy has proved that they are destructive of the public welfare and come to be tyrannies, grinding tyrannies.¹

But he argued that the bill at present went beyond the constitutional power of Congress. The Constitution, he pointed out,

did not give to the Congress of the United States, and it did not mean to give, and it ought not to have given it, and ought not to give to it now, I think, the power to enter into the police regulations of the people of the United States, to endeavor to conduct or to manage or to regulate their affairs as the states, in every state of the Union, have been authorized—not authorized, but left by the Constitution in their original right to do so.²

The true relation between capital and labor, he stated, was an equation. To allow laborers to combine for higher wages, and not allow employers to combine for higher prices, he concluded, was inequitable, and sure to break down. And Senator Platt also believed the present bill to be unconstitutional. Moreover, he thought that it did not distinguish adequately between proper combinations and those of a predatory character. Thereupon, on a motion by Senator Walthall, the Senate by a

¹ *Congr. Rec.*, 1890, vol. 21, p. 2726.

² *Ibid.*, p. 2727.

vote of 31 to 28 agreed to refer the bill with all its amendments to the judiciary committee, with instructions to report within twenty days.¹

On behalf of the judiciary committee, Senator Edmunds, on April 2d, reported the bill back to the Senate.² This bill struck out all of the previous bills after the enacting clause, and substituted an entirely new measure. The members of the judiciary committee at this time were Senators Edmunds, Hoar, Ingalls, Wilson of Iowa, Evarts, Coke, Vest, George, and Pugh.³ Their new bill was now presented in the same form in which, after much debate, it was finally enacted into law. Its provisions were as follows:

Section 1. Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars,

¹ *Congr. Rec.*, 1890, vol. 21, p. 2731.

² *Ibid.*, p. 2901.

³ We are indebted to the researches of Mr. Albert H. Walker for the discovery of the authors of this bill. Senator Edmunds wrote sections 1 (except 7 words), 2, 3, 5, 6, Senator George wrote section 4, Senator Hoar wrote section 7, Senator Ingalls section 8, and Senator Evarts the seven words of section 1 "in the form of trust or otherwise."

or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States, or the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act: and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section 4 of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person" or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

On April 8th the Senate, as in committee of the whole, proceeded to the consideration of the bill.¹ After little debate, during which Senator Sherman stated his approval of the present form of the bill, it was agreed to, and reported to the Senate.

A number of amendments were now offered, all of which, however, were defeated. Senator Reagan proposed to amend section 7 by permitting persons to sue, not only in federal courts, but also "in any state court of competent jurisdiction."² But it was pointed out by a number of speakers that Congress had no power to enable a state court to award damages, and the amend-

¹ *Cong. Rec.*, 1890, vol. 21, p. 3145.

² *Ibid.*, p. 3146.

ment was defeated by a vote of 36 to 13.¹ Senator George then offered an amendment to section 7, permitting any number of persons injured by the same combination to join in bringing a suit for damages, and providing that the court should find a separate judgment for each complainant, according to the circumstances, but it was rejected without debate. Senator Reagan next offered an amendment to section 3, providing "that each day's violation of any of the provisions of this act shall be held to be a separate offense," but this also was immediately rejected.²

At this point Senator Kenna introduced a question of interest. He asked of Senator Edmunds the exact meaning of monopoly, whether it applied to a person, who by means of superior skill, received all the orders in any industry. To this Senator Edmunds replied in the negative, and Senator Hoar further gave a definition of monopoly: "It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." Senator Gray then proposed to strike out of section 2 the words "monopolize, or attempt to monopolize," but this was quickly rejected.³

The vote on the bill as a whole was then taken, and it was passed by 52 yeas to 1 nay. The single nay was recorded by Senator Blodgett, of New Jersey, who took no part in the debate and did not explain his vote. Thereupon, the title of the bill was amended so as to read: "A bill to protect trade and commerce against unlawful restraints and monopolies."

After passing the Senate, the Sherman bill reached the House on April 11, 1890, and was at once referred to the judiciary committee.⁴ This, however, was not the

¹ *Congr. Rec.*, 1890, vol. 21, p. 3151.

² *Ibid.*, p. 3151.

³ *Ibid.*, p. 3152.

⁴ *Ibid.*, p. 3326.

first introduction of the House to the trust question. In 1888, at least 12 bills against trusts were proposed, but were never reported from the committees to which they were assigned. At this time, also was undertaken the House investigation, conducted by the committee on manufactures. Consequently, this body was fairly familiar with the various aspects of the problem.

On April 25th, the bill was favorably reported from the committee,¹ and on May 1st it was opened to debate. Mr. Culberson of Texas, in introducing the bill,² said he thought it could be quickly disposed of, as it was far less important than the other two bills on which the judiciary committee were to report. The measures to which he referred were bills concerning copyrights and bankruptcy. Mr. Bland interposed the objection that the bill was of the greatest importance, and should be fully discussed; since in its present form it was worthless, and in need of amendments to carry out its purpose.

Thereupon, Mr. Culberson undertook to explain and defend the measure. In regard to section 1, he said:³ "Now, just what contracts, what combinations in the form of trusts, or what conspiracies, will be in restraint of the trade or commerce mentioned in the bill, will not be known until the courts have construed, and interpreted this question." But he cited certain examples, which he considered to be the restraints covered by the bill. One was the system of discounts given to retailers who handled only the goods of a certain manufacturer at stated prices, on penalty of losing the discount if they broke the agreement. This, it will be remembered, was the method practiced by the Whiskey Trust to retain

¹ *Congr. Rec.*, 1890, vol. 21, p. 3587.

² *Ibid.*, p. 4088.

³ *Ibid.*, p. 4089.

control over its products. Another was the system of special contracts, directly in restraint of trade, employed by the Standard Oil Trust, and by the Beef Trust.

"These," he said, "are some of the cases which I think fall within the operation of the bill." The meaning of "monopoly," according to Webster, was "To engross, to obtain by any means, exclusive right of trade to any place or within any country or district, as to monopolize the trade."¹ The attempt to do this, he continued, was forbidden by the bill.

At this point, Mr. Butterworth asked several specific questions. Suppose, he queried, the Standard Oil Company of Ohio, in selling to Texas agents, fixed the selling price for those agents, without authorizing them to drive out competitors? This Mr. Culberson considered legal, if they sold to everybody in that way. Again, asked Mr. Butterworth, suppose a combination at Chicago should purchase beef consigned from other states, and should by arrangements with its agents throughout those states, keep the price below a certain figure? This Mr. Culberson considered, would be prohibited by the bill. And lastly Mr. Butterworth asked: "Suppose a Chicago firm should consign its beef to a butcher in my town, and should afterwards, upon his insisting upon selling the meat at a lower price than they directed, establish another butcher by his side, refusing to sell any more to the first, and authorizing the second to sell at a lower price until the first was driven out of the business; would that be reached by this bill?" Which Mr. Culberson again answered in the affirmative.

Thereupon, Mr. Culberson explained section 4, pointing out that it gave the Attorney-General power to in-

¹ *Congr. Rec.*, 1890, vol. 21, p. 4090.

stitute suit. Mr. Henderson of Iowa, thought each district attorney should have this power, but Mr. Culberson insisted that suits would be of such great importance, that they should be directed from a central head. Then, Mr. Culberson took up section 6, showing the importance of forfeiture to the government of any goods which are the subject of a contract, combination or conspiracy in restraint of trade, under the same conditions as goods wrongfully imported into the country. He next called attention to section 7, saying that it allowed people to sue for damages in a circuit court, whether or not the sum exceeded in quantum \$2000. He also emphasized the fact, that as jurisdiction in state courts was not specifically denied, it was permitted. He ended his explanation, with the remark that Congress could completely crush the trusts, by removing the tariff from those articles which were manufactured by trusts, but stated that this would be inadvisable, because since nearly all products were handled by combinations, it would strip all the revenue from the government, and force them to resort to direct taxation.

The next speaker was Mr. Wilson, of West Virginia. He criticised the bill severely, as being quite inadequate: "I, for one, Mr. Speaker, do not believe that this bill will accomplish the purpose for which it purports to be enacted,"¹ And he considered that the only way to strike the trusts was through the corporations, adding that this could most effectively be accomplished by the states. And then he turned to the relation between the tariff and the trusts, pointing to the existence of trusts in Germany and their failure in England.

His thought is summed up in this sentence: "If there

¹ *Congr. Rec.*, 1890, vol. 21, p. 4092.

is a remunerative demand for products, there is little temptation and no necessity for forming trusts. It is only when the power of production has outstripped the power of consumption that this temptation and almost necessity exist.”¹ In this country, he insisted, our supply has outstripped our demand. For this condition there were but two remedies, either to open markets to commerce and let out the surplus, or to create trusts and throttle commerce. On being asked what law prevented exports, he replied it was the tariff which prevented imports. And he further criticised the Republicans: “You hold out to a man great prizes, you dangle before his eyes the opportunity of making great wealth, and then you say, ‘If you sieze upon these prizes we are going to punish you.’”² Finally, he submitted extracts from many articles to bring out his views. These explained that the present tariff was protective in nature, that this stimulated production excessively and that this excess, being closed to commerce by the tariff, brought about the formation of combinations against commerce.

Mr. Sayers, of Texas, now offered an amendment permitting the President to suspend the tariff on articles made by a trust, but he was called out of order by the Chair.

Mr. Ezra B. Taylor replied to Mr. Wilson’s arguments, denying all relation between the tariff and trusts, pointing to the existence of trusts in England, and averring that many of our most highly protected articles were not involved in trusts. Thereafter, he declared himself opposed to trusts, describing them as the “monster who robs the farmer on one hand, and the consumer on the other.”³ And he favored this bill which proposed to destroy them.

¹ *Congr. Rec.*, 1890, vol. 21, p. 4093.

² *Ibid.*, p. 4095.

³ *Ibid.*, p. 4098.

Mr. Cannon, of Illinois, also criticised Mr. Wilson for confusing the trust and the tariff questions, and declared himself strongly in favor of the proposed bill. And then he informed Mr. Wilson that the tariff bill at that time under consideration

repealed the juggling sugar schedule under which the Sugar Trust was formed, and put sugar upon the free list. It will relieve each inhabitant of the country, great and small, rich and poor, from the exaction of at least \$1 a year, upon sugar alone, and at the same time, destroy the sugar trust.

This curious admission of the connection between the tariff and the Sugar Trust does not appear to have been followed up, however, and the subject was allowed to drop.

Mr. Bland now offered an amendment to come in after section 8, providing that contracts for the prevention of competition in transported commodities, or in the transportation of persons or property, between different states, be prohibited.¹

Pending the vote, Mr. Heard of Missouri and Mr. Rogers of Arkansas, pointed to the ability of those Senators who had passed on the measure, and then Mr. Fithian stated his economic views of trusts.

It is sufficient for me to know [he said] that they exist, that they are an evil, that they are destroying the legitimate commerce of the country, that they enhance the price of commodities to the people beyond an honest profit and that they are a crime against the government and against the people. These causes are sufficient to call for the intervention of the power of the government for their suppression.

¹ *Congr. Rec.*, 1890, vol. 21, p. 4099.

Thereupon Mr. Bland offered his amendment;¹ which was passed without debate; and immediately after, with this amendment, the bill was passed.

Congress now entered upon a series of conferences between committees of the two houses, during which a number of amendments were proposed and rejected.

The bill, with the Bland amendment, was received back by the Senate on May 2nd, and immediately referred to the judiciary committee. This body reported the bill on May 12th; Senator Hoar offering an amendment to section 2 in place of that suggested by the House.² In presenting this amendment, he stated that the first part of Mr. Bland's proposal exceeded the authority of Congress, in attempting to "treat forever after" articles which have once been the subjects of interstate commerce. But the second part of the proposal, that "contracts or agreements entered into for the purpose of preventing competition in the transportation of persons or property from one state or territory into another shall be deemed unlawful," he concurred in, although he explained that he had considered such cases already covered by the bill.³

¹ "Every contract or agreement entered into for the purpose of preventing competition in the sale or purchase of a commodity transported from one state or territory to be sold in another, or so contracted to be sold, or to prevent competition in transportation of persons or property from one state or territory into another shall be deemed unlawful within the meaning of this act; provided that the contracts here enumerated shall not be construed to exclude any other contract or agreement declared unlawful in this act."

² *Ibid.*, p. 4559. "Every contract or agreement entered into for the purpose of preventing competition in transportation of persons or property from one state or territory to another shall be deemed unlawful within the meaning of this act."

³ *Ibid.*, p. 4560. "We suppose that it is already covered by the bill as it stands—that is, that transportation is as much trade or commerce

Mr. Vest objected to Mr. Hoar's amendment on the ground that it struck out all reference to articles of merchandise, and seemed to narrow the force of the bill down to transportation. To this Mr. Hoar replied that this was already covered by the rest of the bill. However, on account of considerable difference of opinion among the Senators, he moved to re-commit the bill (May 13th) to the judiciary committee.¹

On May 16th a new amendment, to the effect that those agreements to prevent competition in transportation "so that the rates of such transportation may be raised above what is just and reasonable" should fall within the act,² was reported for the judiciary committee by Senator Edmunds. The adoption of this amendment, with the words as added, by the Senate, and the evident feeling that this amendment brought transportation into line with articles of commerce, shows that the criterion intended to be used by the Senate in the adjudging of monopolies was that of justice and reasonableness. This is interesting in view of the various attempts made by the Supreme Court to ascertain the proper criterion.

This amendment, however, was rejected by the House,³ and a new conference, composed of Senators Edmunds,

among the several states as the sale of goods in one state to be delivered in another, and, therefore, that it is covered already by the bill as it stands. But there is no harm in concurring in an amendment which expressly describes it, and an objection to the amendment might be construed as if the Senate did not mean to include it. So we let that stand."

¹ *Ibid.*, p. 4599.

² *Ibid.*, p. 4753. "That every contract or agreement entered into for the purpose of preventing competition in transportation of persons or property from one state or territory into another, so that the rates of such transportation may be raised above what is just and reasonable, shall be deemed unlawful within the meaning of this act."

³ *Ibid.*, p. 4837.

Hoar and Vest, for the Senate, and Messrs. Taylor, of Ohio, Stewart, of Vermont, and Bland, of Missouri, for the House, was agreed on.

The new conference committee, after a considerable period, finally adopted a report which was signed by four of its members, Senators Edmunds and Hoar, and Representatives Taylor and Stewart. On June 11th, Mr. Stewart presented this report to the House. It recommended the same wording for the amendment as that previously offered, but with the addition "And nothing in this act shall be deemed or held to impair the powers of the several states in respect of any matters in this act mentioned."¹

At the same time, Mr. Stewart stated on behalf of the committee that the original two things were declared illegal: contracts in restraint of interstate trade, and the monopolization of such trade; that its only object was the control of trusts; that the House amendment extended the scope of the act to all agreements to prevent competition in the purchase or sale of commodities, or in the transportation of persons or property, no matter how destructive the competition; and that the new amendment struck out the clause relating to merchandise, and modified the clause relating to transportation agreements, so as to include only those which raised rates above what is just and reasonable.

The first part of the new amendment, that combinations relating to merchandise were already prohibited in the bill, was accepted by all the speakers; but heated opposition, especially on the part of Messrs. Culberson, Bland, Anderson and Hill, was evoked by the proposal to affix the standard of justice and reasonableness to

¹ *Congr. Rec.*, 1890, vol. 21, p. 5950.

rates made by combinations in transportation. These gentlemen, in the long debate which followed, insisted that no such criterion was proper, that any arrangement whereby rates were fixed was detrimental to competition, and that all combinations, no matter what their effect on rates might be, should come under the ban of the law. In this view, they were upheld by the House, which on the next day, June 12th, decided by a vote of 115 to 12 to reject the conference report.¹ Thereupon, by a vote of 106 to 98, a new conference committee with instructions to recede from the House amendment was ordered, and Messrs. Stewart, Taylor and Culberson were appointed as conferees.²

This action of the House was laid before the Senate on June 16th. On motion by Senator Edmunds, the conference was agreed to, and Senators Edmunds, Hoar and Vest appointed to represent the Senate.

The unanimous recommendation of the committee, with the exception of Senator Vest, to the effect that both Houses withdraw their amendments, was reported to the House on June 20th. After the registering of numerous protests against the dropping of the amendment, the conference report was adopted by a vote of 242 to 0, 85 not voting.³

The Senate, having already passed the bill in this form, it only remained for the Speaker of the House, the President of the Senate, and the President of the United States to sign it. Accordingly, on July 2d, 1890, an "Act to protect trade and commerce against unlawful restraints and monopolies" became a law.

¹ *Congr. Rec.*, 1890, vol. 21, p. 5981.

² *Ibid.*, p. 5983.

³ *Ibid.*, p. 6314.

CHAPTER II

HISTORY OF ANTI-TRUST LEGISLATION IN CONGRESS, 1890-1913

AFTER the passage of the Sherman act in 1890, Congress seems to have rested on its laurels for a decade. During these years, sporadic attempts to amend the existing law, and pass new laws were made, but the bills that were introduced were all referred to committees, where they died.

As these bills represented the views of individual members, not even of a sufficiently strong minority to force them to debate, they may be passed over without further remarks. It should be noted, however, that in 1894, the Senate was sufficiently cognizant of the continuance of the trust evil, to enact certain amendments to the Wilson tariff act,¹ forbidding the existence of combination

¹ *Cong. Rec.*, vol. xxvi, p. 7117.

Sec. 73. That every combination, conspiracy, trust, agreement, or contract, is hereby declared to be contrary to public policy, illegal, and void, when the same is made by or between two or more persons or corporations, either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor,

between two or more persons engaged in importing articles into this country, when they tended to raise the price of such articles, or in any way restrain trade.

Early in 1896 the House requested from the Attorney General his views on the Sherman act. Although Mr. Harmon responded on February 8th with specific amendments¹ this letter was referred to the judiciary committee, from which it never emerged.

Mr. Cleveland's attitude, moreover, was not conducive to action. His opinion was that the federal government was by its nature incapable of coping with the trust problem, and that it should be left to the states.

A complete study of the Congressional Records for these years shows that in the 51st Congress (1889-91) 2 bills and 1 resolution were introduced in the Senate and 18 bills and 1 resolution in the House; in the 52nd Congress (1891-3), 2 bills and 1 resolution were proposed in the Senate and 13 bills in the House; in the 53rd Congress (1893-5), 6 bills were proposed in the Senate and 8 bills and 1 resolution in the House; in the 54th Congress (1895-7), 4 bills were proposed in the Senate and 4 bills in the House; in the 55th Congress (1897-9),

and, on conviction thereof in any court of the United States, such person shall be fined in a sum not less than \$100 and not exceeding \$5,000. and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Sec. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 73 of this act, and being in the course of transportation from one State to another, or to or from a Territory, or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

¹ *Cf. infra*, p. 68.

4 bills were proposed in the Senate and 7 bills in the House; in the 56th Congress (1899-1901), 2 bills and 2 resolutions were proposed in the Senate, and 17 bills and 5 resolutions in the House.

Of these bills many were duplicates of those already proposed. They may be summed up as suggesting almost every conceivable manner of treating the trust problem, and as embodying all the various opinions that could be held.

It was not until the 56th Congress that any of these bills were reported back by committees. Finally, however, one bill (H. R. 10569) and one resolution (H. Res. 138) were so reported, and came before Congress for discussion.

The 56th Congress was confronted in 1899 by the demand on the part of President McKinley for further legislation. In response to this, and in view of the recent enormously rapid growth of the concentration of industry, a number of constitutional amendments and new laws were proposed, of which two, one amendment and one law, were reported back to the House by its judiciary committee. Each of these, moreover, was accompanied by a majority and minority report, representing, respectively, the views of the Republicans and Democrats.

The House joint resolution 138 proposed an amendment to the Constitution giving Congress greater power to deal with the trust problem.

Two views were filed on this proposal.¹ They showed the partisan nature of the difference of opinions, the majority report being submitted by the nine Republicans on the committee, and the minority report by the seven Democrats. As such, their value is greatly lessened.

¹ *H. Rept.* no. 1501, 56th Congress, 1st sess.

The amendment to the Constitution recommended by the majority was to the effect that the power of Congress should be over all parts of the United States, that Congress might define and regulate monopoly directly, while reserving to the states the right to act independently.¹

The majority explained at length the need for the amendment, on the ground that Congress was now powerless to prevent monopoly, through the differentiation by the Supreme Court between manufacture and commerce, and because the states also were powerless. For this condition they asserted that a constitutional amendment was the only remedy. We should have "a remedy [that] will enable Congress to restrain and, if need be, repress absolutely all illegal and dangerous combinations which restrain trade or destroy competition, or which may unjustly harass or oppress labor." They were careful to explain that combined capital was not an evil, but a great advantage. On the other hand they insisted "when combined capital abuses its legitimate powers; when it becomes oppressive or assumes the form of gigantic monopolies, that it becomes dangerous and detrimental to the State."

They then took up the relation of the tariff to the existence of monopoly, and decided there was no connec-

¹ The report on the Joint Resolution to amend the Constitution, May 15, 1900, was worded as follows:

Sec. 1. All powers conferred by this article shall extend to the several states, the territories, the District of Columbia, and all territory under the sovereignty and subject to the jurisdiction of the United States.

Sec. 2. Congress shall have power to define, regulate, prohibit or dissolve trusts, monopolies or combinations whether existing in the form of a corporation, or otherwise.

The several states may continue to exercise such power in any manner not in conflict with the laws of the United States.

Sec. 3. Congress shall have power to enforce the provisions of this article by appropriate legislation.

tion. Their conclusion was that to remove the tariff would ruin our industries, especially the independent ones, and open the door to international combinations.

Under the heading of "Suggested Remedies" they examined refusing the mails to monopolies; this was decided to be inadequate, since Congress could only forbid the use of interstate mails, and therefore, monopolies within a state would hand over their produce to private parties in the same state, who would then ship to other states. In several ways such a law could be evaded.

As the only remedy, the report closed by saying:

The power Congress now has is largely one of annoyance. . . . Congress should have power to maintain an open field for honest competition in all industrial enterprises throughout the entire Union; in efforts to accomplish such result Congress should not be compelled to act indirectly, or resort to legislation of questionable expediency, or of doubtful constitutionality.

The minority denied the present impotency of Congress, blaming rather the law and its execution for the existence of the trust evil. They contended that the tariff was a great factor in the creation of monopoly, and that the Republican party was playing fast and loose in declaiming against trusts, and keeping up its protective tariff. They then criticised the wording of the proposed amendment especially the phrase in section one that "All powers conferred by this article shall extend to the several States, the Territories, the District of Columbia, and all territory under the sovereignty and subject to the jurisdiction of the United States," and inquired why this should be included, since it was already covered by the constitution. And they concluded with the statement that this amendment took from the states any power

they may have possessed in dealing with trusts, and lodged it exclusively in Congress, so that in future the trusts might remain in power simply by controlling that body.

Debate on this amendment occupied the attention of the House almost completely for three days, May 31 and June 1 and 2, 1900. Many speeches were made for and against it, which were marred, however, by their purely partisan character. They were carried on along the lines suggested by the two reports, nothing worthy of note being added. The two parties agreed on one proposition, however, the universal desirability of competition.

The party differences may be classified under four heads :

(1) The Republicans claimed impotency as the cause of their failure properly to prevent the existence of trusts. The Democrats charged bad faith in the passing and execution of laws, which they considered Congress had full power to enact.

(2) The Republicans claimed that there was no connection between the existence of monopolies and a high protective tariff, while the Democrats urged that the latter directly aided in the creation of the former.

(3) The Republicans conceived of the trust question as one of national scope, with which Congress alone had the power to deal, while the Democrats argued that both the federal government and the states should have power to deal with trusts, in order that between them they might the more effectually prohibit every attempt at monopoly.

(4) The Republicans inserted the word "regulate" in section 2 of their proposed amendment. This would mean that they might permit and regulate monopolies. To this the Democrats objected on the ground that all

monopolies should be made illegal as such, and should be strictly prohibited.

The resolution, having been finally brought before the House, on June 2, 1900, was defeated by an almost purely party vote, 154 to 132, thus lacking the two-thirds majority necessary for a constitutional amendment. Since it embodied the views of more than a majority of the House, however, it has been considered worthy of this notice.

The attempt to amend the Constitution having been defeated, Congress now turned its attention to the new legislation proposed (H. 10539).¹ On this subject there were again majority and minority reports from the judiciary committee,² and again the party line was sharply drawn.

The Republican majority report, after complaining of the lack of power of Congress, went on to say:

“It is now settled by the decisions of the Supreme Court of the United States that manufacture and production are no part of interstate commerce.” And further

It is impossible for Congress to define, control, repress, or dissolve trusts, monopolies or combinations in manufacture or production. It may, however, declare them, when organized for improper purposes, illegal for the purpose of interstate or foreign commerce and control their products when becoming a part thereof. It may enact such laws, and punish the violation thereof, but farther it cannot go.

¹ *Sen. Doc.*, no. 147, p. 631, 57th Congr., 2nd sess. The main features of the bill are brought out in the report.

² *H. Rept.*, no. 1506, 56th Congr., 1st sess. May 16, 1900.

Mr. Parker, of New Jersey, a Republican, filed a second minority report, disagreeing with the majority, however, in only one detail.

The underlying theory of the report is shown by this sentence: "To properly protect the field of competition against the ravages of monopolistic greed without obstructing the growth incident to honest energy, intelligence and economy, as evidenced in the management of legitimate enterprises, the committee recommend an extension of the provisions of the act of July 2, 1890."

This shows clearly that any legislation leading up to price regulation was not thought of. Emphasis was placed on the freedom of the individual to maintain progress. After commenting on sections 9, 10, 11, 12 and 13, they repudiated any connection between the tariff and the trusts.

The next sentence is of interest:

We have also considered the various suggestions that have been made relative to publicity, and while it is perhaps probable that some advantages might result therefrom, we are of the opinion that the inconvenience and disturbance to legitimate industry and business would be very much in excess of any advantage that might reasonably be expected from such legislation, and therefore do not deem it wise to recommend any such legislation.

Under the heading of "What this bill attempts" they explained that "The act proposed to be amended hereby has been tested in the courts and declared constitutional. We do not deem it wise to change any of its substantive provisions." Then they maintained that the penalties were inadequate and proposed to increase them, and they extended the meaning of "persons" in section 8 to the agents of a corporation, with the purpose of creating a personal responsibility.

The minority agreed with the majority in their opinion as to the "evil effects of trusts, monopolies and combi-

nations," but criticised their bill as being weak and inadequate in the following sentence: "We think that it is the direct effect of the operations of such a corporation, and not simply the purpose for which it was formed, that must be mainly looked at." Consequently, they proposed an amendment of section 9 to this effect. They further proposed to limit section 10 to the punishment of common carriers.

And they then inserted four new sections, proposing to shift the original sections 11, 12 and 13 to sections 15, 16 and 17. These four additional sections were 11, 12, 13, 14, as follows: New section 11. Declared that every combination was illegal, and its promoters, agents or officers were liable to fine and imprisonment. New section 12. Provided that the President might, within his discretion, suspend the tariff on any article controlled by a combination. New section 13. Provided that foreign corporations should be subject to the law of the state in which they did business. New section 14. Provided for publicity of companies doing interstate business by filing with the United States Secretary of State all the facts pertaining to itself, including a résumé of its business, capitalization, dividends and surplus. In connection with this section they stated: "All such corporations are monopolistic, and their business is carried on in such manner as to destroy competition, and that was the very object for which they bought up the plants of rivals in other states." They then denied the statement of the majority that Congress had not the power to regulate monopolies of manufacture. By the term "regulate" they meant "obstruct"—and they further maintained that anything which prevented competition was a regulation. Congress then had the exclusive power to regulate interstate commerce. Lastly, to section 7, they pro-

posed the amendment that nothing in the act be applied to labor organizations or trade unions.

The debate on these reports lasted one whole day, June 2, 1900. During its course, the views contained in the reports were re-stated at length, but nothing of a substantially new character was added. The minority amendments were then brought forward in turn, and each, by a strictly partisan vote, was defeated except the amendment to section 7, which provided that "Nothing in this act shall be so construed as to apply to trade unions or other labor organizations, organized for the purpose of regulating wages, hours of labor, or other conditions under which labor is performed." This was carried by a vote of 260 to 8.

Following this, the bill, with its single amendment, was passed by a vote of 274 to 1, 7 voting "present" and 70 not voting.¹ The single opponent to the bill was Mr. James R. Mann, of Illinois, a Republican who took no part in the debate, and did not explain his reason for dissenting.

The bill passed to the Senate on June 4, 1900, on the day before its adjournment. Owing to this circumstance, Senator Pettigrew pressed the bill, and asked that the Senate immediately adjourn into a committee of the whole for its consideration. But objection was raised, and a spirited debate ensued on the question whether the Senate should refer it to the judiciary committee. Senator Butler, of South Carolina, obtained the floor, and in a long argument stated that he considered the root of the trust problem to be in the private ownership of banks of issue, of the railroads, and of the telegraph lines. He then said that he wished to propose an

¹ *Congressional Record*, 1900, vol. xxxiii, p. 6502.

amendment to the House bill covering these points, but that he was willing to vote for this bill in case he could not force through his amendments. Thereupon, he asked for a roll-call on the motion to refer the bill to the judiciary committee, which being taken, was found to have been passed 43 to 23.¹ This ended the attempt in 1900 to amend the Sherman act.

The 57th Congress convened in December, 1901, and was met by a characteristically vigorous message from the new President, Theodore Roosevelt. In this message, he insisted on the importance of publicity in the regulation of corporate business.²

The usual flood of bills was introduced, 1 in the Senate and 13 in the House, together with three House joint resolutions. Nothing came of these, however, until the 2nd session, when the judiciary committee, urged by the President's second message, reported one of the bills (H. R. 17) back to the House on January 26, 1903, filing both majority and minority reports. This bill, proposed by Mr. Littlefield, of Maine, was far-reaching in its scope. The reports, as in the previous Congress, were marred by their extreme partisan character.

The majority report stated that the object of the bill was

to more effectively regulate and control, on conservative lines industrial and business combinations which, in their operation, prove injurious to the public welfare. It involves the idea of publicity, additional legislation to prevent discrimination by rebates or special privileges upon the part of railroad companies, and seeks to prevent the effort to destroy competition in particular localities by discrimination in prices, and

¹ *Congressional Record*, 1900, vol. xxxiii, pp. 6669, 6670.

² *Cf. infra*, p. 72.

prohibits railroad companies from transporting goods in violation of the provisions of law and contains provisions intended to facilitate the enforcement of this Act, as well as existing legislation upon the same lines.¹

After the House had listened to several long speeches dealing with the general subject of trusts, Mr. Littlefield obtained the floor to explain his new bill.² The first three sections described in detail the returns and reports to be made by corporations, the manner of making public the abstracts of these returns, and the punishment for making false reports. Then the bill went on to provide for and define the Commission, its powers of regulation, and duties of investigating the affairs of the companies. In its provisions regarding transportation, the bill forbade the railroads to give and corporations to receive rebates or advantages from "facilities," and railroads to transport any articles known to have been made illegally. Witnesses were forbidden to refuse to testify on grounds of self-incrimination, and local cut prices were declared unlawful. Finally, the bill insured effective administration of its provisions by the appointment of a Special Commission.

The Democratic minority reported a series of amendments, along the same line as those reported in the previous Congress, each of which, after a short debate, was defeated by a party vote.

The Republicans again insisted on the complete separation of the trust and the tariff questions, in this respect being upheld by the President.³ The Democrats

¹ *H. Rept.*, no. 3375, 57th Congr., 2nd sess.

² *Congr. Rec.*, 57th Congr., 2nd sess., p. 1845.

³ Message of the President, December 2, 1902. *House Doc.*, no. 1, 57th Congr., 2nd sess.

"The only relation of the tariff to big corporations as a whole is that

were equally vigorous in asserting the close connection of the two, and repeatedly questioned the good faith of their opponents in bringing forward a bill that was sure to prove futile. However, although they failed to carry any of their amendments, they joined with the Republicans in the final passage of the bill, which was passed without a dissenting vote.¹

The bill was sent to the Senate and shortly after reported back by the judiciary committee; but on a motion by Senator Berry to consider the bill on February 28, 1903, the Senate refused to do so by a vote of 41 to 30.² So nothing came of the attempt to alter the trust law in this Congress.

However, despite the failure of direct legislation, this Congress, spurred on by the President, passed two important laws.

The first of these was the bill to expedite hearings (S. 6773), which was introduced by Senator Hoar on January 7th, 1903, and was explained by Senator Fairbanks as simply to give precedence to cases of importance arising under the anti-trust act in which the government was the complainant. This passed the Senate without objection and was sent to the House, where it was amended in its wording, but not in its sense, and passed.³ On Mr. Hoar's statement that the amendment was "merely verbal," the Senate again passed the bill as amended,⁴ on February 6th, and it was signed by the President on February 11th, 1903.

the tariff makes manufactures profitable, and the tariff remedy proposed would be in effect simply to make manufactures unprofitable. . . . The question of regulation of the trusts stands apart from the question of tariff revision."

¹ *Congr. Rec.*, 57th Congr., 2nd sess., p. 1915.

² *Ibid.*, p. 2792.

³ *Ibid.*, p. 1747.

⁴ *Ibid.*, p. 1783.

The second law enacted by Congress was the creation of the Bureau of Corporations as part of the new Department of Commerce and Labor. The Bureau had previously been proposed in the House by Mr. Sulzer, of New York, but his motion was defeated by a vote of 90 to 75 on January 17th, 1903.¹ It was only after many disagreements and conferences between the Senate and the House as to the scope of the new Department that the section creating the Bureau of Corporations was embodied in the act as a compromise measure, and passed with the rest of the act, February 14, 1903.²

¹ *Congr. Rec.*, 57th Congr., 2d Sess., p. 917.

² Sec. 6. That there shall be in the Department of Commerce and Labor a bureau to be called the Bureau of Corporations, and a Commissioner of Corporations who shall be the head of said bureau, to be appointed by the President, who shall receive a salary of five thousand dollars per annum. There shall also be in said bureau a deputy commissioner who shall receive a salary of three thousand five hundred dollars per annum, and who shall in the absence of the Commissioner act as, and perform the duties of, the Commissioner of Corporations and who shall also perform such other duties as may be assigned to him by the Secretary of Commerce and Labor or by the said Commissioner. There shall also be in the said bureau a chief clerk and such special agents, clerks, and other employees as may be authorized by law.

The said Commissioner shall have power and authority to make under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company or corporate combination engaged in commerce among the several States and with foreign nations excepting common carriers subject to "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public.

In order to accomplish the purposes declared in the foregoing part of this section, the said Commissioner shall have and exercise the same

The creation of the Bureau was a definite step, though not a long one, in the direction of publicity.

Neither of the acts was of paramount importance, and yet, as the first legislation which Congress had passed since 1890, they mark a distinct advance in the treatment of the trust problem.

The 58th and 59th Congresses, from December, 1903, to 1907, may be passed over with the comment that Congress showed no outward signs of concern over the existence of the trust problem. A number of bills, indeed, were introduced in each session; but they were never reported from committee. Meanwhile also, a number of resolutions to investigate specific questions were introduced, and here we find the chief signs of life. While most of these resolutions were laid on one side, some few were passed. Notable among these, were the

power and authority in respect to corporations, joint stock companies and combinations subject to the provisions hereof, as is conferred on the Interstate Commerce Commission in said "Act to regulate commerce" and the amendments thereto in respect to common carriers so far as the same may be applicable, including the right to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said "Act to regulate commerce" and by "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, supplemental to said "Act to regulate commerce," shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section.

It shall also be the province and duty of said Bureau, under the direction of the Secretary of Commerce and Labor, to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law.

investigation of "Certain Railroads,"¹ "Suits instituted under the Sherman law,"² "Combinations of coal and oil-carrying roads,"³ "Prosecutions arising out of the Northern Securities"⁴ and the "Lumber Trust."⁵

In this connection, it must be mentioned that great progress was made in the collateral fields of railway and pure food legislation; but these lie out of the range of this study.

Of the 60th Congress, the first session was chiefly taken up by the discussion of the Aldrich Banking Report, and other matters. Two new bills, and three amendments were proposed in the Senate, and three bills and nine amendments were proposed in the House. A number of other bills, applying specific remedies, such as the suspension of patents, duties, and the forbidding of the mails, were also introduced.

Only one, however, (S. 6440) was reported back by the Senate judiciary committee, and that unfavorably. This was a unanimous report made on January 26, 1909, in the second session, after a few more proposals had been put forward.⁶ It was on a bill proposed by Mr. Warner, which gave to corporations the privilege of registering with the Commissioner of Corporations, and filing notice of any contracts or combinations with him, subject to his approval. If he did not object to such contracts on the ground of unreasonableness within thirty days, then "no suit, prosecution, or proceeding

¹ *Congr. Rec.*, 59th Congr., 1st sess., pp. 1701-2.

² *Ibid.*, p. 9089.

³ *Sen. Rep.*, no. 32, 59th Congr., 1st sess., and *H. R. Doc.*, nos. 561 and 606, 59th Congr., 2nd sess.

⁴ *H. Reps.*, nos. 117 and 163, 59th Congr., 1st sess.

⁵ *Congr. Rec.*, 59th Congr., 2nd sess., p. 1330.

⁶ *Sen. Rep.*, no. 848, 60th Congr., 2nd sess.

shall lie under the anti-trust act on account of such contract or combination unless the same is in unreasonable restraint of trade.”¹ Railroads, also, were given the same privilege, on filing contracts with the Interstate Commerce Commission, subject to its approval.

The committee first reviewed the facts of law, and concluded that

The doctrine and effect of all these cases is that any agreement or combination directly affecting the welfare of the public, by stifling competition and breeding monopoly in trade and commerce, is contrary to public policy and invalid, and that the courts in such cases will not undertake to measure the degree of the stifling of competition or the degree of monopoly. In such cases, the reasonableness of the restraint is not measured or considered.

And after pointing out that the doctrine of reason only applied when the interest of private parties was the principal affair, they stated “The reasonableness of such contracts or combinations was never made a question under the common law, because they were deemed to be contrary to public policy in this that they stifled competition and bred monopoly, and on that account were deemed to be invalid.” And they further pointed out that the courts had denied to themselves the power of deciding “whether a contract or combination in general restraint of trade is reasonable or not.” The committee’s interpretation of the proposed amendment, then, was

technically as to criminal prosecutions, and practically as to civil prosecutions, a dispensing power, a power of granting immunity is, in the one case, conferred on a mere bureau head,

¹ *Sen. Rep.*, no. 848, 60th Congr., 2nd sess., p. 8.

and in the other case on an administrative body, and in both cases without notice or hearing and wholly *ex parte*—a course of procedure that would not be tolerated in any court of our country.

And, in conclusion, they said that this act "would lead to the greatest variableness and uncertainty in the enforcement of the law," and "would entirely emasculate it, and for all practical purposes, render it nugatory as a remedial statute." The last sentence showed their entire satisfaction with conditions: "The act as it exists is clear, comprehensive, certain, and highly remedial. It practically covers the field of federal jurisdiction, and is in every respect, a model law."

At this time, also, was passed in the House, a resolution to investigate the Paper Trust.¹

The first session of the 61st Congress was a special session, called by President Taft on March 15th, 1909, for the especial purpose of revising the tariff. During this session, which lasted until August 5th, a number of bills to suppress trusts were proposed.² These, however, met with their now customary fate in committees.

The close relation between the protective tariff and the formation of trusts was at all times insisted on by the Democrats, who brought forward proposals³ to modify the tariff under monopolistic conditions.⁴ Their existence was to be determined in various ways, such as the amount of the imports or the rise of price of home

¹ *Congr. Rec.*, 60th Congr., 1st sess.; H. Res., 320, 321, 344.

² 3 new bills in House. Amendments: 1 in Senate, 3 in House. 1 House bill to suspend patents.

³ *Congr. Rec.*, 61st Congr., 1st sess., pp. 1006 and 1335.

⁴ Mr. James, in the course of a speech, presented the names of 13 trusts, which, he claimed, were making a profit of from 25 to 97 per cent. on their capital.

commodities. But to no avail. All such connection was vigorously denied by the Republicans, who were able to enact their views into law.

During this session, also, a senate resolution to investigate the Sugar Trust was passed.¹

In the second session, several resolutions calling for information from the Attorney-General concerning alleged combinations to advance the prices of wheat and cotton,² and concerning the Sugar Trust,³ and from the President, requesting information regarding certain steel companies,⁴ were passed. Other resolutions in the House failed, and a resolution in the Senate introduced by Senator Cummins, to appoint a commission to investigate violations of the Sherman act, was tabled. The customary bills were also introduced: Three in the Senate and seven in the House, to prevent and suppress trusts, and eight in the House to use specific means against monopolies.

Only one (H. R. 26233), an amendment to the "Expedition Act" of 1903, introduced by Mr. Bartlett, was passed. This provided for the appointment of a district judge, in case of the absence or sickness of circuit court judges, to carry out in practice the expedition hoped for in the act of 1903. It further provided for the appointment by the Chief Justice of an extra circuit judge, in case of an even balance of the judges hearing a case. After being reported favorably by the judiciary committees of both houses, it passed without discussion⁵ and was signed by the President on June 25th, 1910.

¹ *Congr. Rec.*, 61st Congr., 1st sess.; H. Res., 19.

² *Congr. Rec.*, 61st Congr., 2nd sess.; H. Res., 613, and *H. Rep.*, 1350.

³ *Ibid.*, H. Res., 679, and *H. Rep.*, 1314.

⁴ *Ibid.*, H. Res., 732, and *H. Rep.*, 1605.

⁵ *Congr. Rec.*, 61st Congr., 2nd sess., pp. 7495, 8875, 9108.

In the third session of this Congress a resolution was passed in the House asking the Attorney-General for information regarding the alleged Coffee Trust.¹

The first session of the 62nd Congress² was especially called for the purpose of considering the Reciprocal Tariff agreement with Canada. A number of bills bearing on trusts were also introduced at this time, none of which were reported from committees. Senator La Follette, however, obtained a chance to make a speech in favor of his proposal,³ in which he laid all the blame for the present evil of monopoly on the Department of Justice for not properly enforcing the law. Resolutions were passed to investigate the Steel Trust,⁴ the Sugar Trust,⁵ and to inquire regarding any criminal prosecutions against the Tobacco Trust.⁶ Many others were proposed, but failed to pass.

The second session of this Congress was as usual marked by a number of bills directed against trusts.⁷ Early in the session, Senator La Follette offered several minor amendments to his bill (S. 3276),⁸ which were referred to the judiciary committee, where they remained. Several proposals, however, were reported back by committees, and passed one or other chamber. Of these,

¹ *Congr. Rec.*, 61st Congr., 3rd sess., H. Res., no. 993, and *H. Doc.*, no. 1421.

² April 5, 1911.

³ *Congr. Rec.*, 62nd Congr., 1st sess.; *S.*, 3276, and pp. 4183-4193.

⁴ *Ibid.*, H. Res., no. 148 and p. 1234.

⁵ *Ibid.*, H. Res., no. 157 and pp. 1142-1147.

⁶ *Ibid.*, H. Res., no. 193 and p. 1746.

⁷ Bills to suppress trusts: 2 in the Senate and 2 in the House; to amend the Sherman Act: 3 in the Senate and 7 in the House; other bills relating to special devices or forms of monopoly: 2 in the Senate and 9 in the House.

⁸ *Congr. Rec.*, 62nd Congr., 2nd sess., p. 295.

the most important was a bill (H. R. 25002) to suppress importers' trusts, by amending sections 73 and 76 of the Wilson Tariff Act of August 27, 1894.¹

There had been some misunderstanding concerning these actions, whether they included contracts made by agents as well as principals, and whether an article was liable to confiscation while it was in transportation from a foreign country to the United States, as well as between states. These points were accordingly corrected, and passed the House.² With slight changes, this bill passed the Senate in the third session,³ and the amendments were concurred in by the House.

The other bills which were debated at this time passed only in one body, and so did not become law. First of these was a Senate bill (S. 3607) to direct the Attorney-General to appeal the circuit court decision of the Tobacco Trust case. After considerable debate it was passed,⁴ but was lost in the judiciary committee of the House. Another was a House bill (H. R. 23470), to protect American trade and shipping from monopolies, whether foreign or domestic,⁵ which passed the House, but failed of adoption in the Senate. A third bill to be reported (H. R. 20194) provided for the payment of awards for information regarding the violation of the Sherman act,⁶ but was not passed.

¹ *H. Rept.*, no. 831, 62nd Congr., 2nd sess.

² *Congr. Rec.*, 62nd Congr., 2nd sess., p. 8306.

³ *Sen. Rep.*, no. 1159, 62nd Congr., 3rd sess., and *Congr. Rec.*, 62nd Congr., 3rd sess., pp. 2571 and 2694.

⁴ *Sen. Rept.*, no. 545, 62nd Congr., 2nd sess., and *Congr. Rec.*, 62nd Congr., 2nd sess., pp. 295-307, 4706-4713, 4773-4782, 5091-5108.

⁵ *H. Rept.*, no. 632, 62nd Congr., 2nd sess., and *Congr. Rec.*, 62nd Congr., 2nd sess., pp. 6849-6851, 7561-7564.

⁶ *H. Rept.*, no. 993, 62nd Congr., 2nd sess.

Besides this, many resolutions of inquiry were proposed, of which some passed. First of these was a request for information from the Attorney-General concerning the Harvester Trust,¹ which he answered with a refusal; second, was an inquiry concerning the existence of a Smelters Trust, to which the Attorney-General replied that he had no evidence of one, nor that the American Smelting and Refining Company constituted in itself a trust;² third, there was appointed a committee to investigate banking and currency conditions, the so-called "Money Trust."³ Moreover, the special committees on the Steel⁴ and Sugar⁵ Trusts at this time each made their reports; and the former was debated at great length.

During the third session, besides the passage in the Senate of the bill already referred to,⁶ there was also passed a bill (S. 8000) providing for publicity in the taking of evidence under the Sherman act.⁷ In the accompanying report⁸ it was explained that publicity had been the general rule for cases in equity; but at the demand of the United Shoe Machinery Company, a district court of Massachusetts had recently issued an order excluding the public. Since this set a precedent which

¹ *Congr. Rec.*, 62nd Congr., 2nd sess.; Sen. Res., no. 250, and *Sen. Doc.*, no. 454, 62nd Congr., 2nd sess.

² *Congr. Rec.*, 62nd Congr., 2nd sess., H. Res., no. 419, and *H. Doc.*, no. 628, 62nd Congr., 2nd sess.

³ *Congr. Rec.*, 62nd Congr., 2nd sess., H. Res., 429 and 504.

⁴ *H. Rept.*, no. 1127, 62nd Congr., 2nd sess., and *Congr. Rec.*, 62nd Congr., 2nd sess., pp. 10078, 10146, 10161, 10304, 10525, 10531, 10625, 10631, 10635, 10638.

⁵ *H. Rept.*, no. 331, 62nd Congr., 2nd sess., and *Congr. Rec.*, 62nd Congr., 2nd sess., p. 2165.

⁶ *Congr. Rec.*, 62nd Congr., 3rd sess., H. Res., 25002.

⁷ *Ibid.*, pp. 1433, 1434, 4704.

⁸ *H. Rept.*, no. 1356, 62nd Congr., 3rd sess.

might be disadvantageous to the public welfare, it was deemed wise to pass a law to this effect.

At this time, also, the committee investigating the concentration of credit made its report.¹ This again served to focus the attention of Congress on the problems awaiting a solution.

This cumulative evidence shows that Congress has been awake to the evils existing in our industrial system. While the proposals described above have all been of minor importance, as regards the general governmental policy, they show that the question is not settled in Congress, and foreshadow a more definite step when greater unanimity of control has been obtained.

¹ February 3, 1913, *H. Rept.*, no. 1593, 62nd Congr., 3rd sess.

CHAPTER III

VIEWS AND POLICIES OF THE ADMINISTRATIONS:

PRESIDENT HARRISON TO PRESIDENT WILSON

IN none of the messages which President Harrison sent to Congress after the passage of the Sherman act, did he mention it.¹ The same is true of Attorney-General Miller, until his last report, in December, 1892.

At this time, he stated that under the anti-trust act, proceedings had been brought against several combinations, and that these were now being determined. Investigations of other alleged violations were reported to be under way, but it was found that "great care and skill have been exercised in the formation and manipulation of these combinations so as to avoid the provisions of this statute." However, it was hoped that the validity and applicability of the statute to business abuses would be upheld.

President Cleveland, likewise, was too preoccupied with other matters to take up the trust question until his last message in December, 1896.

His Attorney-General, Mr. Richard Olney, however, contributed freely of his views, and they are interesting in showing the opinion that was then held of the act by an acute lawyer. In his report of December, 1893, after

¹ During President Harrison's administration were instituted four bills in equity and three indictments, under the Sherman Act. See *The Sherman Anti-trust Act*, published by the Dept. of Justice, July 1, 1912.

referring to the impression that the aim of the statute was to prevent those aggregations of capital which practically controlled all the branches of an industry, he asserted that for this there was small evidence: *First* because the statute operated only on interstate commerce, and thus excluded that "immense mass" of contracts which were included by the states; *Second*, because every ownership of property was a monopoly, and every partnership a restraint of trade, there was diversity of construction among judges. The one general interpretation of the act so far given,¹ so limited its scope and the power of Congress, as to render the statute worthless, since to apply it "not merely must capital be brought together and applied in large masses, but the accumulation must be made by means which impose a legal disability upon others from engaging in the same trade or industry." However, he concluded with the opinion that the subject was so important that he was now engaged in bringing it before the Supreme Court.

In his next annual report, December, 1894, he stated only that the test case he was bringing before the Supreme Court (the Knight case) had been argued, and, he hoped, would shortly be decided.

Mr. Olney was succeeded during the year by Mr. Judson Harmon. At the time of his first annual report, in December, 1895, the Knight case had been decided ad-

¹*In re Greene*, 52 Fed., 104. The Circuit Court of the Southern District of Ohio had held that: (1st) Congress could not limit the right of state corporations in acquisition or control of property. (2d) Congress could not prescribe the prices at which such property be sold by the owner. (3d) Congress could not make criminal acts sanctioned by the states. (4th) "Monopoly" meant an exclusive right of one party, coupled with a legal restraint upon some other party. (5th) Contracts in restraint of trade prohibited by the statute are general in their nature, and already forbidden by common law.

versely to the government, and his views were brief and pessimistic. "Combinations and monopolies, therefore, although they may unlawfully control production and prices of articles in general use, can not be reached under this law merely because they are combinations and monopolies, nor because they may engage in interstate commerce as one of the incidents of their business." This view, however, he shortly after explained at length, together with his constructive ideas.

On February 8th, 1896, at the request of the House, he sent a special letter containing his views of the Sherman act, and his recommendations for its amendment.¹ In this letter, Mr. Harmon stated that he had investigated all complaints made to him, and that two actions were at the time pending, both of which related to agreements among interstate carriers. These two were presumably the Trans-Missouri case and the Freight Association case. He then took up the question of further legislation, pointing out defects in the existing law. These he treated under four heads:

(a) That the Sherman act did not apply to the most complete monopolies acquired by unlawful combination of concerns which were naturally competitive, if engaging in interstate commerce were merely one of the incidents of their business, and not its direct and immediate effect. He said Congress might make it unlawful to ship from one state to another, in carrying out, or attempting to carry out the designs of such organizations, articles produced, owned or controlled by them or any of their members or agents. At present, such organizations fell under neither the state or federal governments. "By supplementing state action in the way just sug-

¹ *House Doc.*, no. 234, 54th Congr., 1st sess.

gested Congress can, in my opinion, accomplish the professed object of the law."

(b) That there was uncertainty of the meaning of the act, because of the general terms employed, and he suggested "an amendment which shall leave no doubt about what is meant by monopolies, by attempting to monopolize, and by contracts, combinations and conspiracies in restraint of trade and commerce." This he urged would bring decisions to questions of fact.

(c) That the law should prevent witnesses from refusing to answer on the ground of self-incrimination; that penalties of the law should apply only to general officers, managers and agents, and not to subordinates; and further that the purchase or combination of competitive enterprises should be made *prima facie* evidence of an attempt to monopolize.

(d) That the present appropriation of the Department of Justice was insufficient for extended examinations; and he recommended that "The duty of detecting offenses and furnishing evidence thereof should be committed to some other department or bureau, which should have power to compel witnesses to testify."

And in his last message, of December, 1896, the Attorney-General merely repeated the views which he had set forth in this letter.

Perhaps the most discouraging feature of this period was the attitude of President Cleveland; it was not until his last annual message of December 7th, 1896, that he took up the subject of combinations at all. Here he noted the continuing growth of trusts and the widespread fear which they aroused. With this fear he declared himself in sympathy, for

when these are defended, it is usually on the ground that

though they increase profits, they also reduce prices, and this may benefit the public. It must be remembered, however, that a reduction of prices to the people is not one of the real objects of these organizations, nor is their tendency necessarily in that direction. If it occurs in a particular case, it is only because it accords with the purposes or interests of those managing the scheme.

He then went on to deplore the inefficiency of the present law,¹ which as interpreted by the courts did not reach the evil at all. Indeed, he declared it to be his opinion that, on account of the complexities of our political system, the federal government was powerless to control them in an effective manner. For this, he said, we must look to the states, and he expressed great confidence in the ability and willingness of the states to remedy such evils as might exist.²

In his first two years, President McKinley was occupied so fully with matters of foreign policy that he did not undertake an inquiry into the industrial situation. So that it was not until his message of Dec. 5, 1899, that he called attention to the great increase in the number of industrial combinations, and stated that President Cleveland had regretted the failure of Congress to stop this evil. Mr. Cleveland, he went on to say, had trusted to the states to regulate and control these combinations, but, on account of the evident failure of this policy to accomplish the beneficial results hoped for, Mr. McKinley deemed it the duty of Congress to extend the present law, and recommended action to that effect.

¹ Quoted in full, *cf. infra*.

² During President Cleveland's administration were instituted four bills in equity, two indictments, and two informations for contempt, under the Sherman Act. See *The Sherman Anti-trust Act*, published by the Dept. of Justice, July 1, 1912.

In his last message, of December, 1900, he merely repeated his former recommendation, and added: "Restraint upon such combinations as are injurious, and which are within federal jurisdiction, should be promptly applied by the Congress."¹

Mr. Joseph McKenna, the Attorney-General in 1897, simply mentioned "a very important decision" that of the *United States v. Trans-Missouri Freight Association*.

His successor, Mr. Griggs, in his report of Nov. 30, 1898, likewise only mentioned under his important decisions, that of the *United States v. Joint Traffic Association*. In the following year, 1899, after reviewing the recent decisions of the Supreme Court, he continued that he "occasionally" received applications to bring suits. "Such actions can be maintained only when the offense comes within the scope of a federal statute." And in the course of his discussion, he added:

"In every instance, therefore, where resort is sought to federal jurisdiction against combinations in restraint of trade, the first question to be decided is, what kind of trade is affected?" This must be: interstate commerce; not state commerce and not production or manufacture, "but that composite transaction known as commerce, which involves the buying, selling and exchange of commodities, and their transportation and delivery."

There is no question of the right and power of every state to make and enforce laws in restraint of monopoly; that is the normal and proper sphere of state autonomy; while the United States, not having been formed as a government for the regulation of the internal affairs and businesses of the

¹ During President McKinley's administration were instituted three bills in equity, under the Sherman Act. See *The Sherman Anti-trust Act*, published by the Dept. of Justice, July 1, 1912.

states, is limited in its authority to the regulation of that kind of business described as commerce between the states and with foreign nations.

In all instances the Department has been governed only by a sincere desire to enforce the law as it exists and to avoid subjecting the government to useless expense and the law officers of the government to humiliating defeat by bringing actions where there was a clear want of jurisdiction.

Consequently, whatever might be the evils of combinations,

All these things are done by virtue of the appropriate and constitutional authority of the several states under state law and except where they invade the territory of Congressional jurisdiction by interfering with interstate and international commerce in a direct manner, they are subject and subordinate to the restraint and control of the individual states where they are carried on.

And in his report of 1900, he undertook no further discussion of the act.

In his first two messages, President Roosevelt confined himself to rather narrow limits. In his first message, in December, 1901,¹ after pointing out the great problem which was presented by the recent growth of consolidations, he said :

The first essential in determining how to deal with the great industrial combinations is knowledge of the facts—publicity. . . . Publicity is the only sure remedy which we can now invoke. What further remedies are needed in the way of governmental regulation, or taxation, can only be determined after publicity has been obtained, by process of law, and in the course of administration. The first requisite is knowledge,

¹ 57th Congress, 1st session.

full and complete—knowledge which may be made public to the world.

And in his second message, in December, 1902, he reiterated this recommendation. "The experience of the past year has emphasized, in my opinion, the desirability of the steps I then proposed. . . . Publicity can do no harm to the honest corporation; and we need not be overtender about sparing the dishonest corporation."

In the next year, December, 1903,¹ President Roosevelt congratulated Congress on its achievements in creating the Bureau of Corporations, and on passing the expediting act.

The scope of the Department's duty and authority embraces the commercial and industrial interests of the nation. It is not designed to restrict or control the fullest liberty of legitimate business action, but to secure exact and authentic information which will aid the Executive in enforcing existing laws, and which will enable the Congress to enact additional legislation, if any should be found necessary, in order to prevent the few from obtaining privileges at the expense of diminished opportunities for the many.

Then, coming to the Bureau of Corporations, he said: "Publicity in corporate affairs will tend to do away with ignorance, and will afford facts upon which intelligent action may be taken." And further: "The purpose of this Bureau is not to embarrass or assail legitimate business, but to aid in bringing about a better industrial condition." And in this connection, he remarked:

The legislation was moderate. It was characterized throughout by the idea that we were not attacking corporations, but endeavoring to provide for doing away with any evil in them;

¹ 58th Congress, 2nd session.

that we drew the line against misconduct, not against wealth; gladly recognizing the great good done by the capitalist who alone, or in conjunction with his fellows, does his work along proper and legitimate lines. The purpose of the legislation . . . was to favor such a man when he does well, and to supervise his action only to prevent him from doing ill. Publicity can do no harm to the honest corporation.

Turning to a discussion of the general policy of the government on capital and labor, he said:

The consistent policy of the national government, so far as it has the power, is to hold in check the unscrupulous man, whether employer or employee; but to refuse to weaken individual initiative or to hamper or cramp the industrial development of the country. We recognize that this is an era of federation and combination, in which great capitalistic corporations and labor unions have become factors of tremendous importance in all industrial centers.

And reiterating that the government would pay attention only to one fact—"the question whether or not the conduct of the individual or aggregate of individuals is in accordance with the law of the land," he concluded, "we have cause as a nation to be thankful for the steps that have been so successfully taken to put these principles into effect." Throughout this veritable paean of victory, Mr. Roosevelt appeared to consider that the trust question was, for the time being at least, well in hand. Any further slight changes, he thought, would be easily put through. The whole tone of the message indicates that at this time, Mr. Roosevelt considered the trust problem virtually, if not completely, settled.

In his annual reports, Attorney-General Knox made no mention of the trust question during these years, other than, in 1903, to suggest that the appropriation of

\$500,000¹ which had been made to enforce the anti-trust law, should be divided up for other purposes, such as the public land, postal, and naturalization frauds.² On January 3, 1903, at the request³ of Senator Hoar, he embodied his views in a letter which was published as a Senate document.

In this letter he first described the cases decided by the courts and those at that time pending. And then he turned to suggestions of further legislation. For this purpose he assumed that the end desired was that "combinations of capital should be regulated and not destroyed, and that measures should be taken to correct the tendency toward monopolization of the industrial business of the country," and that beyond this point regulation was to be avoided. Monopoly, he believed, was impossible without unfair, discriminatory practices; and the advantages of small, personally-conducted businesses were such as to prevent the growth of large ones without such practices. The first step, accordingly, was the assurance of equal rights and opportunities to all industries by preventing discriminations, either in the form of rebates by carriers or low prices in particular localities for the purpose of destroying competition.

At present, he explained, the punishable offenses of shippers were confined to two classes. First, where the shipper had solicited or participated in instances of unjust discrimination, in which case rivals must be proven to be paying a higher rate; but often rivals had long ago been crushed out by this practice and no longer existed. Second, the cases of fraud perpetrated by the shipper, as

¹ Appropriation Act of Feb. 25, 1903 (32 Stat., 854, 903).

² *Annual Reports of the Attorney-General*, 1901, 1902, 1903.

³ *Sen. Doc.*, no. 73, 57th Congr., 2nd sess.

false representation of the contents of a package. It had been decided that the penalty for charging more or less than the published rate did not apply to an incorporated company. Only the individual who allowed the rate could be punished, and he obtained immunity by testifying to the fact; moreover, the law did not punish the beneficiary of the unlawful rebate. These facts pointed to a necessary correction of the law.

The act should also be made to include those businesses which manufactured wholly within a state, but whose products entered into interstate commerce, so as to prevent their ability to receive rebates from carriers and their practice of selling commodities below the general price in certain localities with a view to destroying competition. In addition, a comprehensive plan to enforce the publicity of all the facts and practices of those concerns engaged in interstate commerce should be framed. And lastly, a commission should be created in order to carry out the Sherman act; this should have large powers of investigation, such as access to books and the ability to compel testimony.

While these proposals, the Attorney-General concluded, did not offer a complete scheme of governmental regulation, still without some such amendments the law would continue to be inadequate.

President Roosevelt's next message, in December, 1904,¹ gave some hint that the whole question was still unsettled, although no definite constructive policy was proposed. At this time, he definitely declared the scope of the problem to be of national importance: "It is an absurdity to expect to eliminate the abuses in great corporations by State action. . . . The national government

¹ 58th Congress, 3rd session.

alone can deal adequately with these great corporations." And he further showed his appreciation of the magnitude of the whole problem.

They [the American people] are acting in no spirit of hostility to wealth, either individual or corporate. They are not against the rich man any more than against the poor man. . . Great corporations are necessary, and only men of great and singular mental power can manage such corporations successfully, and such men must have great rewards. But these corporations should be managed with due regard to the interest of the public as a whole. Where this can be done under the present laws, it must be done. Where these laws come short, others should be enacted to supplement them.

And he concluded, that a growth of a proper sentiment was the real solution for the evils complained of. "More important than any legislation is the gradual growth of a feeling of responsibility and forbearance among capitalists and wage workers alike . . . in their relations to their fellows who with them make up the body politic."¹

In the annual message of 1905,² after commenting on the continuance of great prosperity in the country, Mr. Roosevelt pointed out that the country was so closely related that it must feel any depression as a whole. And then he continued:

Yet, it is also true that where there is no governmental restraint or supervision some of the exceptional men use their energies not in ways that are for the common good, but in ways which tell against this common good.

¹ In this year Attorney-General Moody did not mention the subject of trusts, except to describe the recently decided Northern Securities case.

² 59th Congress, 1st session.

The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give to the sovereign—that is, to the government which represents the people as a whole—some effective power of supervision over their corporate use.

In order to insure a healthy social and industrial life, every corporation should be held responsible by, and be accountable to some sovereign strong enough to control its conduct. I am in no sense hostile to corporations. This is an age of combination, and any effort to prevent all combination will be not only useless, but in the end vicious, because of the contempt for law which the failure to enforce law inevitably produces.

The makers of our national constitution provided especially that the regulation of interstate commerce should come within the sphere of the general government. The arguments in favor of their taking this stand were even then overwhelming. But they are far stronger to-day, in view of the enormous development of great business agencies, usually corporate in form. Experience has shown conclusively that it is useless to try to get any adequate regulation and supervision of these great corporations by state action. Such regulation and supervision can only be effectively exercised by a sovereign whose jurisdiction is co-extensive with the field of work of the corporations—that is, by the national government.

And he regretted that the Sherman law was of a negative, rather than affirmative character. "It is generally useless to try to prohibit all restraint on competition, whether this restraint be reasonable or unreasonable; and where it is not useless it is generally hurtful." Then he pointed out the inadequacy of regulation by means of law suits, and advocated a commission with proper powers of regulation and supervision.¹ The

¹ "Events have shown that it is not possible adequately to secure the

greatest abuse, he insisted, was overcapitalization—the demoralizing influence whereof he dwelt on at length.

The above argument thus led him to the conclusion that “Until the national government obtains, in some manner which the wisdom of the Congress may suggest, proper control over the big corporations engaged in interstate commerce,—that is over the great majority of the big corporations—it will be impossible to deal adequately with these evils.”

In his annual report of 1905,¹ Mr. Moody, the Attorney-General, gave an interesting sidelight on his policy.

Numerous alleged violations of the Sherman act have undergone careful examination by the Department. In some cases, after full examination, the Department has declined to take action, and in other cases the investigation is still in progress. Several cases are in such a state of completion that action in the near future is likely to be taken.

Later in the session, in transmitting a letter from the Attorney-General describing the suit against the “Beef

enforcement of any law of this kind by incessant appeal to the courts. The Department of Justice has for the last four years devoted more attention to the enforcement of the anti-trust legislation than to anything else. Much has been accomplished; particularly marked has been the moral effect of the prosecutions; but it is increasingly evident that there will be a very insufficient beneficial result in the way of economic change. The successful prosecution of one device to evade the law immediately develops another device to accomplish the same purpose.

“What is needed is not sweeping prohibition of every arrangement, good or bad, which may tend to restrict competition, but such adequate supervision and regulation as will prevent any restriction of competition from being to the detriment of the public—as well as such supervision and regulation as will prevent other abuses in no way connected with restriction of competition.”

¹ Dec. 1, 1905, 59th Congr., 1st sess.

Packers,"¹ President Roosevelt pointed out the absurdity of the decision which gave immunity to everybody called to testify before the Bureau of Corporations, from all acts which he or his corporation had committed, and demanded legislation to remedy this condition.

Mr. Moody, in this letter, made two suggestions: first, that the government be given the right of appeal in criminal cases, and second, that the immunity thus granted to persons whose corporations happened to have been examined by the Bureau of Corporations, be removed.

In a short message accompanying the Bureau of Corporations' report on the oil industry,² Mr. Roosevelt pointed out the great evils of discriminating rates. And he denied that individual initiative would be harmed by government supervision. "On the contrary, the proper play for individual initiative can only be secured by such governmental supervision as will curb those monopolies which crush out all individual initiative." And then he again recommended a commission to administer the law.

His next message³ was largely a repetition of his last. In forceful language, he pointed out the necessities of the situation.

In some method, whether by a national license law or in other fashion, we must exercise, and that at an early date, a far more complete control than at present over these great corporations—a control that will among other things prevent the evils of excessive over-capitalization, and that will compel the disclosure by each big corporation of its stockholders and of its properties and business, whether owned directly or

¹ *H. R. Doc.*, no. 706, 59th Congr., 1st sess., Apr. 18, 1906.

² *Sen. Doc.*, no. 428, 59th Congr., 1st sess., May 4, 1906.

³ 59th Congr., 2nd sess., Dec. 4, 1906.

through subsidiary or affiliated corporations. This will tend to put a stop to the securing of inordinate profits by favored individuals at the expense whether of the general public, the stockholders, or the wage workers. Our effort should be not so much to prevent consolidation as such, but so to supervise and control it as to see that it results in no harm to the people.

And he insisted that this was not socialism, but an antidote which would prevent socialism. The plan should not stifle, but encourage individual initiative and energy. "We hold that the government should not conduct the business of the nation, but that it should exercise such supervision as will insure its being conducted in the interest of the nation. Our aim is, so far as may be, to secure, for all decent, hardworking men, equality of opportunity and equality of burden."

Attorney-General Moody, at this time, also discussed the act at length.¹ And he criticised it in three important aspects. First, the exact meaning of "restraints," "monopolization" and "interstate commerce" had not yet been decided. Second, "one main purpose of the law that competition shall not by agreements be suppressed, runs counter to the tendencies of modern business." Third, he complained of the insufficient means for carrying on investigations.

Four things, however, were clear: First, that the law was constitutional; second, that combinations of manufacturers incidentally restraining trade were not included under the act; third, that combinations of manufacturers fixing prices and suppressing competition were within the prohibitions of the act; and fourth, that combinations of competing railroads by which rates and fares were fixed, were forbidden by the act although rates were reasonable.

¹ *Annual Report*, Dec. 1, 1906.

And in the course of litigation, it had further been established: (1) That the suppression of competition by means of a holding corporation was a violation of the act, even though the acquisition by itself were lawful. (2) That manufacturers purchasing raw material from various states and territories, and after manufacturing, selling their products throughout the country, were engaged in interstate commerce. (3) That state corporations were subordinate to the rules of Congress; and that they had no constitutional privilege to refuse to show their books.

An interesting sidelight on the policy of the administration at this time,¹ is afforded by a letter from Mr. Herbert Knox Smith, head of the Bureau of Corporations, while the question of instituting a suit against the International Harvester Company was under consideration. The President had put the matter in the hands of the Attorney-General and Mr. Smith, with instructions that they confer with Mr. Perkins, representing the Harvester Company. Mr. Smith reported adversely to the proposed suit. Mr. Perkins had claimed that the company had followed the policy of publicity maintained by the Administration, had done nothing, so far as it was aware, in violation of the law, had offered complete access to its books, and had urged an investigation. This investigation was now taking place under the direction of the Bureau. Mr. Smith concurred in this attitude, especially because all the complaints against the company had been traced to two sources: trade papers deprived of advertising, and the general feeling against all combinations.

¹This letter was only published at a later date. *Sen. Doc.*, no. 604, 62nd Congr., 2nd sess.

And he concluded :

This case raises the question included in what the President has called " good and bad trusts ; " the question whether mere combination, as such, shall be prohibited ; whether the government is going to try to forbid all combinations regardless of their methods or ends, or whether, on the other hand, it is going to pursue the policy, frequently stated by the President, of regulation and control rather than of prohibition.

The abandonment of this case indicates the Administration policy that reasonable combinations should be permitted, and that only unreasonable ones should be disturbed.

Mr. Roosevelt's messages were all marked by novel and energetic language. By now, however, he had little to add to the constructive program which he had been advocating. In his 1907 message¹ he again urged the national character of the trust problem and the necessity of combination in modern industrial life. The following extracts from his long recommendations will suffice to indicate his policy at this time :

The anti-trust law should not be repealed ; but it should be made both more efficient and more in harmony with actual conditions. It should be so amended as to forbid only the kind of combination which does harm to the general public, such amendment to be accompanied by, or to be an incident of, a grant of supervisory power to the government over these big concerns engaged in interstate business. This should be accompanied by provision for the compulsory publication of accounts and the subjection of books and papers to the inspection of the government officials.

Among the points to be aimed at should be the prohibition of unhealthy competition, such as by rendering service at an

¹ 60th Congr., 1st sess.

actual loss for the purpose of crushing out competition, the prevention of inflation of capital, and the prohibition of a corporation's making exclusive trade with itself a condition of having any trade with itself. Reasonable agreements between, or combinations of, corporations should be permitted, provided they are first submitted to and approved by some appropriate government body.

The Congress has the power to charter corporations to engage in interstate and foreign commerce, and a general law can be enacted under the provisions of which existing corporations could take out federal charters and new federal corporations could be created. An essential provision of such a law should be a method of predetermining by some federal board or commission whether the applicant for a federal charter was an association or combination within the restrictions of the federal law.

Attorney-General Bonaparte at this time¹ outlined his policy in an interesting manner :

The policy of the Department in this field of its activity has been to investigate very carefully all complaints or information brought to its attention respecting alleged offenses under the statutes in question, and to set on foot proceedings, either civil or criminal, only when fully satisfied not merely that the laws had been violated, but that sufficient proof of such violations could be obtained to justify a reasonable hope of success in the prosecution, and that the public interests demanded action on its part for the proper vindication of the law.

And remarking on the ineffectiveness of an injunction owing to the delay, expense and trouble involved in furnishing legal proof of well-known facts, he recommended "the enactment of a statute which, in such civil cases, will give the process of the courts engaged in trying

¹ *Annual Report*, Dec. 2, 1907.

them the same scope in securing attendance of witnesses as is permitted by existing law with regard to process in criminal cases for similar purposes." He refrained, however, from suggesting any changes in the substance of the act.

And again, in a special message on March 25th, 1908, Mr. Roosevelt repeated his opinion of the immediate necessity of amending the Sherman law.¹ He especially recommended the filing of all contracts with the Bureau of Corporations, and the approval by the Interstate Commerce Commission of all new railway securities.

In his last annual message, in 1908,² Mr. Roosevelt declared that he could only repeat what he had already recommended. And then he continued:

We who believe in the movement of asserting and exercising a genuine control in the public interest over these great corporations have to contend against two sorts of enemies, who, though nominally opposed to one another, are really allies in preventing a proper solution of the problem. There are first, the big corporation men, and the extreme individualists among business men, who genuinely believe in unregulated business—that is, in the reign of plutocracy; and second, the men who, being blind to the economic movements of the day, believe in a movement of repression rather than of regulation of corporations, and who denounce the power of the railroads and the exercise of the federal power which alone can really control the railroads.

In conclusion he urged that "there should be regulation by the national government, of the great interstate corporations, including a simple method of account-keep-

¹ *Sen. Doc.*, no. 406, 60th Congr., 1st sess.

² 60th Congr., 2nd sess.

ing, publicity, supervision of the issue of securities, abolition of rebates and of special privileges.”¹

Attorney-General Bonaparte simply announced that the same policy as before was being pursued.² And while he refrained from any suggestions, still “it seems appropriate to advise the Congress that serious obstacles have been encountered in their effective enforcement which can be, and in my opinion may be, with advantage readily removed by further legislation.”

President Taft embodied his views and recommendations in regard to trusts in a special message, which he sent to Congress on January 7th, 1910.³ In this carefully and clearly-expressed document the President first explained the moving causes of combinations. Of these he found three: the possibility of great economies, the reduction of excessive competition by a union of competitors, and the possibility of securing a monopoly and completely controlling prices or rates.

Turning to the construction of the Sherman act, Mr. Taft came to several interesting conclusions.

First, “We must infer that the evil aimed at was not the mere bigness of the enterprise, but it was the aggregation of capital and plants, with the expressed or implied intent to restrain interstate or foreign trade, or to monopolize it in whole or in part.”

Second, a combination which only incidentally, and not inevitably or directly, restrained trade, did not fall within the act.

¹ During President Roosevelt’s administration were instituted eighteen bills in equity, twenty-five indictments, and one forfeiture proceeding, under the Sherman Act. See *The Sherman Anti-trust Act*, published by the Dept. of Justice, July 1, 1912.

² *Annual Report*, Dec. 18, 1908.

³ *H. R. Doc.*, no. 484, 61st Congr., 2nd sess.

And lastly he emphasized that the act "was not to interfere with a great volume of capital which, concentrated under one organization, reduced the cost of production and made its profit thereby, and took no advantage of its size by methods akin to stifle competition with it."

He twice referred to the word "reasonable." First, saying that, while the Supreme Court had declined to read this word into the statute, still its distinction between direct and indirect restraints accomplished the same purpose of excluding from prohibition those many minor and reasonable contracts which were not intended to be included. Later, recurring to this phase of the question, that the decision whether a combination was reasonable or not should be left to the courts, he said:

I venture to think that this is to put into the hands of the court a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden that they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster.

And then he turned to his recommendation—federal incorporation for all industries doing interstate business. Such corporations would then come under the regulation of the government; their issues of securities would be supervised; they would make reports at regular intervals; they would be prevented from holding stock in other companies without permission. A law embodying these views was presented to the appropriate committees by the Attorney-General.

In his annual message of December 6th, 1910,¹ Mr.

¹ 61st Congr., 3rd sess.

Taft shortly renewed his recommendation of national incorporation. He then referred to the recently published report of the Bureau of Corporations on the lumber industry, endorsing its conclusion that this industry was combined in so few hands that it might easily lead to a combination. And he ended with the words:

I do not now recommend any amendment to the anti-trust law. In other words, it seems to me that the existing legislation with reference to the regulation of corporations and the restraint of their business has reached a point where we can stop for a while and witness the effect of the vigorous execution of the laws on the statute books in restraining the abuses which certainly did exist and which roused the public to demand reform.

Attorney-General Wickersham, in his two reports of 1909 and 1910, shortly announced that he was continuing the policy of his predecessor towards combinations.

On April 30, 1909, Mr. Wickersham in a public speech admitted that the law was not entirely definite.¹

But certain of the principles underlying that law are assuredly now understood, and any attempt at this time, with the present construction of that law agreed upon by all the higher courts, to combine in the form of a trust or otherwise, with the obvious intention of restraining commerce among the states or of creating a monopoly of an important part of that commerce, would evidence such deliberate intention to break the law as to justify and compel the government to use all or any of the remedies given by law adequate to prevent the accomplishment of such purpose and to punish the attempt.

In answer to an inquiry from the Senate why the suit

¹ *Congr. Rec.*, 61st Congr., 1st sess., p. 1935.

instituted against the New York, New Haven and Hartford Railroad had been discontinued, Mr. Wickersham made an interesting statement,¹ which can only be explained as a resuscitation of the discarded policy of state control over corporations. He explained that the state of Massachusetts had recently enacted a statute authorizing the consolidation of the Boston and Maine Railroad, and the New York, New Haven and Hartford Railroad and then said:

In view of the fact that the suit of the United States now pending against the New York, New Haven and Hartford and the Boston and Maine Railroad Companies for a violation of the anti-trust act rests almost entirely upon a claim that these companies had already consolidated by means of stock ownership, and since the community most directly affected is the State of Massachusetts, whose laws now expressly authorize such consolidation, the Attorney-General has determined to dismiss the government's action.

In a speech on June 21, 1911, shortly after the Standard Oil and Tobacco decisions,² President Taft said: "I believe those decisions have done and will continue to do great good to all the business of the country, and that they have laid down a line of distinction which it is not difficult for honest and intelligent business men to follow."

And in his annual message of December 5, 1911,³ he referred to the Standard Oil and Tobacco decisions as epoch-making.

These decisions suggest the need and wisdom of additional or supplemental legislation to make it easier for the entire busi-

¹ *Sen. Doc.*, no. 116, 61st Congr., 1st sess.

² *Congr. Rec.*, 62nd Congr., 1st sess., p. 4188.

³ 62nd Congr., 2nd sess.

ness community to square with the rule of action and legality thus finally established and to preserve the benefit, freedom, and spur of reasonable competition without loss of real efficiency or progress.

Then he undertook to defend them. The interpretation of reasonableness, he asserted, was the test of the common law, where it was well understood. Discussing the objections made regarding the large size of the companies into which the Tobacco Trust was dissolved, he said :

This contention results from a misunderstanding of the anti-trust law and its purpose. It is not intended thereby to prevent the accumulation of large capital in business enterprises in which such a combination can secure reduced cost of production, sale and distribution. It is directed against such an aggregation of capital only when its purpose is that of stifling competition, enhancing or controlling prices and establishing a monopoly.

Then he enlarged upon the effectiveness of the statute, pointing out that now that it was recognized, there was a demand for its repeal, on the ground of its obstructing economy, and he reiterated: "In the recent decisions the Supreme Court makes clear that there is nothing in the statute which condemns combinations of capital or mere bigness of plant organized to secure economy in production and reduction of cost . . . mere size is no sin against the law."

He also answered the charge of indefiniteness, saying that men knew what they were doing when they suppressed competition. Further he wanted described by law, and forbidden :

The attempt and purpose to suppress a competitor by under-

selling him at a price so unprofitable as to drive him out of business or the making of exclusive contracts with customers under which they are required to give up association with other manufacturers and numerous kindred methods for stifling competition.

And then he repeated his message of Jan. 7, 1910, recommending federal incorporation. This, he concluded, should be administered by a commission to supplement the courts.¹

In his annual report of December, 1911, Attorney-General Wickersham merely outlined his policy in regard to the dissolution of combinations.

It was my conviction that it was the proper concern of the law officers of the government to see to it that, in the new conditions to be formed, no one company should have such a large amount of the business of the country in any particular line dealt in as to threaten or accomplish monopoly.

And in his last report of December, 1912, he expressed his conviction of the excellence of the statute in its present form.

The federal courts are exercising in equity suits under the Sherman law a power to restrain which is co-extensive with the evils against which it was enacted, and it has been the effort of the department to bring before the court for the application of this rule all combinations in violation of law which have been brought to its notice.

An examination of these decrees will also show that the courts have found no difficulty in applying the terms of the law to meet and enjoin the continuance of any form of unfair competition which has resulted in imposing an undue restraint upon interstate commerce, or which makes for monopoly.

¹ Mr. Taft does not seem to have mentioned the trust question in any message during the last session of this Congress.

I am strongly of the opinion that the advocacy of amendments of the law which shall particularize different acts as constituting unlawful restraints of trade or attempts at monopoly, has its origin, not so much with those who desire the enforcement of the law, as with those who are anxious to secure a safe means of its evasion. An enumeration by statute of the different practices which, in and of themselves, without regard to the circumstances of particular cases, should be declared illegal, will either go too far or not far enough.¹

¹During President Taft's administration were instituted forty-six bills in equity, forty-three indictments, and one contempt proceeding, under the Sherman Act. See *The Sherman Anti-trust Act*, published by the Dept. of Justice, July 1, 1912, with supplements bringing it to date.

CHAPTER IV

THE DECISIONS OF THE SUPREME COURT

THE decisions of the Supreme Court constitute by far the largest element in the determination of the policy of the government. The interpretation and application of the anti-trust act through this tribunal have undergone many changes since its passage in 1890. New social conditions have required altered policies, and these find their reflection in the decisions of the Court. This chapter will consist of a description of all the cases decided by the Supreme Court, compressed into as little space as possible, consistent with their complete understanding. They have been conveniently collected in four volumes, under the title of *Federal Anti-Trust Decisions, 1890-1912*, by Mr. James A. Finch and Mr. John L. Lott. References are given to these volumes, as well as to the United States Reports.

*United States v. E. C. Knight Co.*¹

This was a bill brought by the government against the E. C. Knight Company and others, alleging that the American Sugar Refining Company had bought this and three other independent Philadelphia refineries in order to obtain complete control of the price of sugar in the United States. On the ground that this was contrary to the Sherman act, the bill prayed that these agreements be declared void, and that an injunction issue restraining performance of these contracts and any other violations of the law of 1890 by the defendants.

¹ *Fed. Anti-Trust Decisions*, vol. i, p. 379; Jan. 21, 1895; 156 U. S. 1.
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Chief Justice Fuller rendered the decision for the Supreme Court. He immediately turned to a definition of monopoly.¹ After explaining the definition of the government, that it "applied to all cases in which one person sells alone the whole of any kind of marketable thing," and included all contracts whereby this was brought about, he declared that, "the monopoly and restraint denounced by the act are the monopoly and restraint of interstate or international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life."²

He rejected all ultimate or possible results of combinations, saying he had nothing to do with political economy or theories concerning the potential restraints of competition or monopoly, and declaring that "the fundamental question is, whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill."

Moreover, he said that the power of Congress was to regulate interstate commerce; the power of states was to suppress monopoly. He then rejected the proposition that "the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created

¹Justice Harlan dissented from the opinion of the court, on the ground that a combination which suppressed competition in the manufacture of an article, thereby constituted a restraint of trade. That restraint, he held, was of interstate trade, even though the article were sold in the same state, because it deprived citizens of other states of the ability to purchase sugar within that state under competitive conditions.

²156 U. S. 10.

it," saying that the result on interstate commerce was "a secondary and not the primary sense," and holding that this power might only repress "monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce."

He then quoted from Justice Lamar's opinion¹ that "no distinction is more popular to the common mind or more clearly expressed in economic or political literature, than that between manufacturing and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. . . . The buying and selling and the transportation incidental thereto constitute commerce."

He further made clear the difference between direct and indirect effects on interstate commerce, holding that the raising of prices or wages would affect commerce only indirectly, however inevitably, and would not "necessarily determine the object of the contract, combination or conspiracy."

He next accepted the proposition that even a tendency to monopoly was sufficient to permit its condemnation, but qualified this, evidently trusting to the states to regulate this class of monopolies. "Slight reflection will show that if the national power extends to all contracts and combinations in manufacturing, agriculture, mining and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."

Having in this manner shown the limits of the act, he then turned to its exact meaning and definition.

¹ 156 U. S. 14.

It was in the light of well settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted.¹ . . . What the law struck at, was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations.²

Under this definition, he declared that since the object of the purchase of the Philadelphia refineries was purely a matter of manufacturing sugar, it bore no direct relation to interstate commerce, and that an attempted or even successful monopoly of manufacture was not an attempt to monopolize commerce, "even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

In re *Debs*.³

Speaking for a unanimous court, Mr. Justice Brewer affirmed in this case the decision of the circuit court in its claim to jurisdiction by injunction over cases of obstruction to interstate commerce, and its power to inquire into the carrying-out of its order, including the power to punish for contempt if it found that this had been disregarded.

While the Supreme Court rested its affirmation on the general grounds of power of government, it concluded

¹ 155 U. S. 16.

² 156 U. S. 17.

³ *Fed. Anti-Trust Decisions*, vol. i, p. 565; May 27, 1895; 158 U. S. 564.

with the following sentence, to show its appreciation of the reasoning of the circuit court:

We enter into no examination of the act of July 2, 1890, C. 647, 26 Stat., 209, upon which the circuit court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but rather that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed.¹

Since, by implication, the Supreme Court accepted the reasoning of the circuit court on this matter so far as it applied to the Sherman act, it becomes of interest to examine into the details of that decision.

*United States v. Debs et al. (Circuit Court of Illinois).*²

Debs and other officers of the American Railroad Union ordered and managed a strike of railroad employees directly against the Pullman Car Company, but involving twenty-two railroads, the result of which was the stoppage by forcible means of all movements, including the United States mails. An injunction was issued ordering them to desist from specified acts, after which it was alleged that the injunction had been disobeyed.

The decision of the circuit court rested on the questions whether that court had jurisdiction, which was answered in the affirmative; whether railroads came under the embracing clause of interstate commerce, which the court considered probable, but having no precedent, decided it safer to rely for their power on the act of July 2, 1890.

¹ 158 U. S. 600.

² *Fed. Anti-Trust Decisions*, vol. i, p. 322; Dec. 14, 1894; 64 Fed. 724.

Under this act the court held it had the power to grant an injunction. It thereupon entered into an elaborate discussion of the scope of the statute. Going back to the discussion in Congress prior to the passage of the act, it found that a proviso to the effect that the act should not be construed to apply "to any arrangements, agreements or combinations made between laborers with a view of lessening hours of labor or of increasing their wages" was rejected, and that the true construction of the act was not only not undertaken by Congress, but was specifically left to the courts.¹

Applying themselves to the task of discovering the extent of the prohibition, the court found that "combinations are condemned not only when they take the form of trusts, but in whatever form found if they be in restraint of trade," and further, "Construed literally, the terms used in the body of this act forbid all contracts or combinations in restraint of trade or commerce; but that construction is controlled by the title, which shows that only unlawful restraints were intended."² "The court found no reason for limiting the word 'unlawful,' but held that a conspiracy is in itself unlawful." "A contract, combination or conspiracy in restraint of trade is therefore a contract in combination or conspiracy to restrain or injure trade."

They then decided that commerce had a broader meaning than trade—including "all instrumentalities and subjects of transportation among the states" and that it was in this sense that Congress employed the word in 1890.

¹ *Congressional Record*, vol. xxi, pt. 5, p. 4089. "Now, just what contracts, what combinations in the form of trusts or what conspiracies will be in restraint of trade or commerce mentioned in the bill, will not be known until the courts have construed and interpreted this provision.

² 64 Fed. 747 *et seq.*

They next took issue with the decision of Judge Putnam in the case of *United States v. Patterson*, for finding that the act covered only contracts, combinations or conspiracies "intended to engross or monopolize the market," as being too narrow in scope. And they asked, "Why should it not be construed to embrace all conspiracies which shall be contrived with intent, or of which the necessary or probable effect shall be to restrain, hinder, interrupt or destroy interstate commerce?"¹

Having thus stated the question and their opinion, the court held that since certain workmen had attempted to force the railroads to stop the use of Pullman sleepers, they could not do that which was forbidden to capitalists, and that therefore, under the act of 1890 the court had jurisdiction in this case.

*United States v. Trans-Missouri Freight Association.*²

Complaint was brought by the district attorney of Kansas, against the association, which comprised the Atchison and seventeen other railroads, on the ground that these roads had entered into an agreement whereby rates were arbitrarily fixed, and the people of that territory were robbed of the benefits which they might have expected from free competition. This agreement went into effect April 1, 1889, and continued despite the act of July 2, 1890, being unlawful thereafter as in restraint of trade. The bill prayed that the association be dissolved and that the members be prohibited from further agreement.

To these allegations, the railroad companies entered a

¹ 64 Fed. 752.

² *Fed. Anti-Trust Decisions*, vol. i, p. 648; Mch. 22, 1897; 166 U. S. 290.

general denial, saying that their actions came under the interstate commerce act of 1887, and that they had not raised rates or acted in a manner detrimental to their patrons, but rather in one beneficial to them.

The charge was denied by the district court of Kansas and also by the circuit court, whence it was appealed by the government to the Supreme Court.

The defendants objected to the bringing of the suit on the ground that the association had been dissolved in 1892, but admitted that another agreement had been entered into. On this ground, and on account of the prayer for injunction against future agreements, the Supreme Court assumed jurisdiction. Also, the Court disallowed the objection that the case involved less than \$1000, saying that a small change in rates would involve more than that sum.

Mr. Justice Peckham, speaking for the Court,¹ then took up the merits of the case, examining first into the question whether the act of 1890 applied to common carriers. "The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations."² The defendants, he continued, urged that the statute only applied to those engaged in the manufacture or sale of articles

¹ Mr. Justice White, with whom concurred Mr. Justice Field, Mr. Justice Gray and Mr. Justice Shiras dissented from this opinion. His grounds were: (1) that the act did not apply to reasonable restraints of trade, and that this restraint had been held a reasonable one by the Court; and (2) that even if this were not the case, the act did not apply to those contracts between carriers for the purpose of classifying freight, preventing rate-cutting, and securing fairness in their dealings with each other. These contracts were either directly sanctioned or impliedly authorized by the interstate commerce act of 1887.

² 166 U. S. 312.

of interstate commerce. But this he denied. "The terms of the act do not bear out such construction. Railroad companies are instruments of commerce and their business is commerce itself."

A lengthy discussion of the commerce act concluded that this act did not sanction an agreement of this nature. And there was no reason to suppose that the anti-trust act meant to except railways.

The Court then examined the discussions in Congress prior to the passage of the bill, and decided that there was no way of ascertaining what the majority thought, so that the decision was forced on the Court. "All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein."¹

The Court next took up the alleged differences between railroads and traders or manufacturers, and said :

The points of difference between the railroad and other corporations are many and great. It cannot be disputed that a railroad is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature. The company may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things.²

Then it showed the resemblances—deciding that a combination by either which raised prices through an agreement was a restraint of trade and affected the public. The effects of trusts or combinations might be

¹ 166 U. S. 318.

² 166 U. S. 321-2.

different, and yet they were essentially similar as being induced by corporate aggrandisement against public interest.

In business or trading combinations, they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. . . . Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital.¹

The Court than pointed out that all progress meant a certain dislocation of business, which it concluded to be necessary. But it took care to show that when such change was brought about by a combination, the result was bad for the public, through the dictation of prices by the combination. "In this light it is not material that the price of an article may be lowered." This was on the social ground of transforming an independent man into a servant of a corporation controlled by others.

Nor is it for the substantial interest of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital.

Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce.

¹ 166 U. S. 323.

The results of contracts, whether those of traders or railways, therefore, were similar, and should be condemned in common. In conclusion, the Court cited the Knight case and others, that the act of 1890 applied, not to monopolies of manufacture, but to monopolies in restraint of interstate or international trade or commerce, and said: "It is readily seen from these cases that if the act does not apply to the transportation of commodities by railroads from one state to another or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative."¹

Since the act applied to railroads the next question was as to the true construction of the act. "Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature?" The decision was that both reasonable and unreasonable restraints of trade were known to the common law; that since all contracts were specified in the act, it plainly meant to include both.

It then entered into a long discussion of the possibilities if this were not the case; and decided that the difficulties of deciding whether a contract were reasonable or not were so various and formidable that Congress might have desired to prohibit all such agreements.

Considering the public character of such corporations, the privileges and franchises which they have received from the public in order that they might transact business, and bearing in mind how closely and immediately the question of rates for transportation affects the whole public, it may be urged that Congress had in mind all the difficulties which we have before

¹ 166 U. S. 326.

suggested of proving the unreasonableness of the rate, and might, in consideration of all the circumstances, have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce, regardless of the question whether such agreements were reasonable or the reverse.¹

It then stated that there were two sides of the argument, whether this agreement should be prohibited. The railroads claimed that it would lead to such destructive competition as to ruin all the roads, while the government claimed that it would merely insure that free competition on which the public depended. It decided that the former view was not so clear as to allow them to read into the act words not contained therein. The Court made it quite clear that its duty was not to ascertain a wise policy, but to interpret the act as it stood.

It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads, and in a failure to secure the advantage sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it, and not this court, by a process of judicial legislation wholly unjustifiable.²

And the Court then stated its interpretation of the act.

The conclusion which we have drawn from the examination above made into the question before us is that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

¹ 166 U. S. 335.

² 166 U. S. 340.

This last question, it decided in the affirmative, saying that the intent of the agreement was of no importance since "the question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does." "There can be no doubt that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act."

*United States v. Joint Traffic Association.*¹

This was a case concerning the validity of an association formed by 31 railroads between New York and Chicago (the majority, though not all of the roads) to maintain, by means of a managing board, reasonable freight and traffic rates. The powers were to be so construed and exercised by the managers as not to violate the interstate commerce act.

The validity of the association was upheld by the circuit court for the southern district of New York and by the circuit court of appeals for the second circuit. Thence it was appealed by the United States to the Supreme Court. Mainly it was like the Trans-Missouri case, but certain other questions were raised and decided by the Supreme Court which warrant a close examination into the doctrines there set forth.

Mr. Justice Peckham, in delivering the opinion of the Court² said: "Upon comparing that agreement with the one set forth in the case of *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, the great

¹ *Fed. Anti-Trust Decisions*, vol. i, p. 869; Oct. 24, 1898; 171 U. S. 505.

² Mr. Justice Gray, Mr. Justice Shiras and Mr. Justice White dissented from the opinion of the court. Mr. Justice McKenna took no part in this decision.

similarity between them suggests that a similar result should be reached in the two cases.”¹

Four reasons against this were given by the defendants: (1) That the question whether the contract then under review was in fact in restraint of trade in any degree whatever was neither made nor decided in the other case, while it was plainly raised in this. (2) That such fundamental differences between the two agreements existed that the former decision was no precedent for this case. (3) That the former construction of the statute rendered it unconstitutional, as unduly interfering with the liberty of the individual and taking away his right to make contracts regarding his own affairs. (4) That the former decision was plainly erroneous, as being at war with justice and sound policy.

In regard to the first, the Court decided that the “unlawful intent in entering into the agreement was held immaterial, but only for the reason that the agreement did in fact and by its terms restrain trade.” In regard to the second, the Court took up the argument that any company might retire from the agreement, but found that it would by so doing incur the enmity of the other lines. “The abstract right of a single company to deviate from the rates becomes immaterial, and its exercise, to say the least, very inexpedient in the face of this power of the managers to enlist the whole association in a war upon it.”² Consequently the Court found that “the natural and direct effect of the two agreements is the same, viz., to maintain rates at a higher level than would otherwise prevail.”

Coming to the third, the constitutionality of the act, the Court declared that it was claimed that Congress

¹ 171 U. S. 558.

171 U. S. 564.

had no right to prohibit those contracts in restraint of trade which were not injurious to society. It was claimed that any and every combination or partnership was thus rendered illegal, since it restrained trade in some degree. The Court held that this last was not true, since "the effect upon interstate commerce must not be indirect or incidental only." "The question really before us is whether Congress . . . has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad corporations . . . even though the rates and fares thus established are reasonable."¹ After showing at some length that the only possible use of such a combination was to maintain rates above what competition would have produced, the Court decided that Congress had this power. It then discussed the public nature of a railroad, being careful to say that it affirmed the power, not the policy, of Congress.

Passing to the fourth reason, that the decision in the *Trans-Missouri* case was wrong, the Court at some length explained that it had twice listened to the argument with full attention, and that therefore it was scarcely surprising that it did not agree to this view.

The Court then took up the argument that a restraint of competition was not a restraint of commerce, but on the contrary that in this case a restraint of competition was beneficial to commerce. To this it refused to agree, saying that the direct effect of competition was to lower rates and thereby stimulate commerce, and that the further result of cut-throat warfare and final single control was uncertain.

On these grounds the Court sustained its *Trans-Missouri* decision and ordered the agreement canceled.

¹ 171 U. S. 568.

*Hopkins v. United States.*¹

The charge of the United States was that the members of an association known as the Kansas City Live Stock Exchange were bound by certain rules which they had adopted: that the exchange was half in Kansas and half in Missouri; that the Kansas City Stock Yards Company was a corporation owning the stockyards where business was done by members; that all the work of handling cattle from many states was done by members, who sold cattle to people of many states, and that great quantities were handled; that the defendants lent money on cattle shipped to them; and that Kansas City was the only place for many miles about, which constituted an available market for the purchase and sale of live stock. This business was alleged to be interstate commerce. By reason of the agreement of the members, outsiders could not sell cattle to any of them. Thus by their rules, they created a restraint of trade intended to be a monopoly violating the act of 1890.

To these charges the defendants replied as follows: They admitted the existence of the rules, but said they were to facilitate business, that all members were free to compete under them, and that any reputable person might become a member. They denied that the effect of the agreement was to restrain trade, or that they were engaged in interstate commerce, or that they could be forced to deal with persons not members or that they must extend their conveniences to non-members.

On the filing of affidavits by the United States, showing that non-members had been injured in business, the circuit court of the United States for the district of

¹ *Fed. Anti-Trust Decisions*, vol. i, p. 941; Oct. 24, 1898; 171 U. S. 578.

Kansas, first division, issued an injunction which restrained the defendants from combining to hinder others or from discriminating against them. An appeal was taken to the United States circuit court of appeals for the eighth circuit, which court certified to certain questions, and sent the case to the Supreme Court on a writ of certiorari.

In his decision,¹ Justice Peckham announced that the chief question before the Court was whether the business of the defendants constituted interstate commerce, or whether it was in the nature of an aid to commerce which only affected interstate commerce indirectly.

The business was one of buying and selling cattle on commission; therefore it was unimportant where the cattle came from or went, since it was "in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them."² He then went further into the nature of the business of the defendants, deciding that, as commission agents, they provided a facility for, but were not engaged in, interstate commerce.³ And then he continued: "Even all agreements among buyers of cattle from other states are not necessarily a violation of the act, although such

¹ Mr. Justice Harlan dissented from the opinion of the court, and Mr. Justice McKenna took no part in this decision.

² 171 U. S. 588.

³ 171 U. S. 591. "Charges for the transportation of cattle between different states are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation."

agreements may undoubtedly affect that commerce." And he concluded that: "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate."

He then cited a number of cases, the voiding of which, he said, would improperly extend the act to matters which were not of an interstate commercial nature.

Among these were: An agreement among land owners along a railroad not to lease their land for less than a certain sum, for the purpose of watering cattle. An agreement among corn dealers at a certain station not to sell below a given price, though cattle must have food. An agreement between builders of cattle cars not to build them under a certain price, although the effect might be to increase the price of transportation between the states. An agreement between locomotive engineers, firemen or trainmen engaged in the service of an interstate railroad not to work for less than a certain wage, even though that might enhance the cost of interstate transportation.

Of all of these he said: "In our opinion all these queries should be answered in the negative."¹ "As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid provided the charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate." And later: "Reasonable charges for the use of a facility for the transportation of interstate commerce have heretofore been regarded as valid in this Court, even though such charges might necessarily enhance the cost of doing the business."

¹ 171 U. S. 594.

Then he further explained his views :

The cattle owner has no constitutional right to the services of the commission agent to aid him in the sale of his cattle, and the agent has the right to say upon what terms he will render them, and he has the equal right, so far as the act of Congress is concerned, to agree with others in his business not to render those services unless for a certain charge. The services are no part of the commerce in the cattle.¹

The Justice then took up the question of exorbitant charges quoting from Mr. Justice Field (*Sands v. Manistee River Improvement Co.*, 123 U. S. 288-294-295) "should there be any gross injustice in the rate of tolls fixed, it would not in our system of government, remain long uncorrected." But he did not seem to consider that this correction should emanate from the Supreme Court, for he said that "whether the charges are or are not exorbitant is a question primarily of local law, at least in the absence of any superior or paramount law providing for reasonable charges."

He then explained further that a sale on commission was not interstate commerce, citing all the other exchanges in the country as examples of local business. Then he concluded that "the answer in regard to all objections is, the defendants are not engaged in interstate commerce."

Finally he turned to the various by-laws to which objection was raised, answering the same as above in each case. "The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it."² All

¹ 171 U. S. 595.

² 171 U. S. 600.

discussion as to restraint was thus precluded because the defendants were not engaged in interstate commerce, and so could not directly restrain it.

The decision favored defendants.

*Anderson v. United States.*¹

This suit was similar to the Hopkins case, except that certain citizens, who were members of the Traders Live Stock Association actually bought and sold cattle themselves, and refused to trade with non-members.

The Court said that, since there was no dispute as to the facts, it only remained to interpret them. On the ground that the association did not prevent others from trading, but merely refused to trade with others themselves; that the association itself did no business; that its members competed among themselves, and any trader might become a member of the exchange upon complying with its requirements; and that the amount of the trade had greatly increased, there was no feature of monopoly in the whole transaction. The question was: this being a local business, whether the traders' association had a right to conduct its private business in this way.

Mr. Justice Peckham, speaking for the Court² did not decide whether or not this was interstate commerce. Even if it were interstate commerce, the agreement was not "to regulate, obstruct or restrain that commerce" but was to regulate the business in which the parties were engaged, and "the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental and not its purpose or object."

¹ *Fed. Anti-Trust Decisions*, vol. i, p. 967; Oct. 24, 1898; 171 U. S. 604.

² Mr. Justice Harlan dissented, and Mr. Justice McKenna took no part in this decision.

Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object.¹

And he concluded that "otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void."²

Since, then, the purpose of this agreement was to standardise the work and morale of the traders, and not interfere with interstate commerce, it was upheld.

*Addyston Pipe and Steel Co. v. United States.*³

In this case, six corporations engaged in the manufacture, sale and transportation of iron pipe, had entered into an agreement as to output and prices.

The trial court dismissed the suit of the United States, but the circuit court enjoined the defendants from maintaining the combination. The charge was that competition by it was stopped in thirty-six states or territories, with the purpose of enhancing the price of iron pipe. An elaborate system of bonuses ensured the proper pro-

¹ 171 U. S. 615.

² 171 U. S. 616.

³ *Fed. Anti-Trust Decisions*, vol. i, p. 1009; Dec. 4, 1899; 175 U. S. 211.

portioning of the business. But when this scheme was found to be not wholly successful, a system of bidding on contracts was employed, by which the association fixed the price, and then gave the contract by a secret competition to the company bidding the lowest price. The successful company then openly bid the association's prices, other companies putting in bogus higher bids to make it seem as if competition continued. The difference between the open and secret bid was divided by the association among its members. By this means, and also by the agreement to allot work in certain cities to certain companies only, high prices were obtained.

The reply to these charges was that the association was necessary to avoid ruinous loss by competition, and that it did not restrain trade or create a monopoly and did not violate the act of 1890.

This case was decided by a unanimous Court. Mr. Justice Peckham, in his decision, pointed out that the defendants claimed that the power of Congress over interstate commerce was limited to protecting it against interference by the states, and that it did not include contracts among individuals, even though these directly regulated such commerce. This might have been the reason for giving this power to Congress, he said, but it did not limit that power.

Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contracts between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purpose, regulate to any substantial extent, interstate commerce.¹

¹ 175 U. S. 228.

He then discussed the liberty of the individual, saying that it did not include the right to enter into contracts on all subjects, but that, "the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the constitution," and that Congress thereunder might prohibit individuals from making contracts which, "directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the states."

He examined at some length the confusion that would result if Congress did not have this power; and concluded that

the plain language of the grant to Congress of power to regulate commerce among the several states includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power as claimed by the appellants.¹

He thus arrived at the question whether this combination was a direct restraint of commerce. And first he took up the objection that it was a "reasonable restraint upon a ruinous competition among themselves." As to this, he quoted from the opinion of Judge Taft to show that it was not reasonable. As he specifically stated that he agreed with this view, it is important to examine it at length.

After conclusively showing that the combination could and did impose such prices as they wished on a large portion of the territory of the United States, Judge Taft said:

¹ 175 U. S. 234-5.

It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in "pay" territory were reasonable. A great many affidavits of purchasers of pipe in "pay" territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that in their opinion the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so.¹

And Justice Peckham denied the second objection that the agreement did not come within the act because it did not amount to a restraint of interstate commerce, since it was not covered by the *Knight* case, which was a combination in manufacturing, "but that contracts for the sale and transportation to other states of specific articles were proper subjects for regulation because they did form part of such commerce." This, he declared, covered the present case, because "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."² "If, therefore, an agreement or combination directly restrains not alone the manufacture but the purchase, sale or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute." And below: "We think it plain that this contract or combination effects that result."

¹ 175 U. S. 237-8.

² 175 U. S. 241.

He then brushed aside as of minor importance several allegations of defendants, saying that

The combination thus had a direct, immediate and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction, the resulting high prices for the pipe would not have been obtained.¹

Then he explained the difference between this and the live stock exchange cases, for one of those cases was held not to be interstate commerce, while the other, if it were, was an agreement of such a character that it did not directly but only indirectly, affect it. Thus, the fundamental question was "whether the necessary effect of the combination is to restrain commerce." To decide this he explained the effect of an increase in price. "The higher price would operate as a direct restraint upon the trade, and therefore any contract or combination which enhanced the price might in some degree restrain the trade in the article."

Thus, he concluded, the defense that the combination did not prevent the letting of any contracts was beside the point, for this was not its purpose—on the contrary, the more work, the better for the combination. But its effect was to stop competition for those contracts, thus raising the prices and restraining trade.

On these grounds, he decided that as far as the agreement affected interstate commerce, it should be dissolved.

*Connolly v. Union Sewer Pipe Co.*²

This was a suit brought by the Union Sewer Pipe

¹ 175 U. S. 243.

² *Fed. Anti-Trust Decisions*, vol. ii, p. 118; Mch. 10, 1902; 184 U. S. 540.

Company against Thomas Connolly, to recover on two notes given by him in the purchase of sewer-pipe at prices agreed upon between the parties. Connolly's reply was, that the Union Company was a trust and unlawful according to (1) the common law, (2) the Sherman anti-trust law, and (3) the Illinois anti-trust law.

The case finally came to the Supreme Court, Justice Harlan rendering the opinion. After deciding that the case was rightly brought before the Supreme Court, Justice Harlan examined the pleas of immunity claimed by Connolly.¹

In regard to the defense based on the common law, he said that while the Court would not enforce a contract in itself contrary to law, still in this case, the contract claimed to be void was not connected with the contract to pay for certain articles which had been sold.² This defense, therefore, was overruled. He also overruled the defense based on the Sherman law, for, although this act prohibited combinations, it did not declare illegal a sale by combinations of property in their possession.³

¹ Mr. Justice McKenna, in a dissenting opinion, insisted that the classification made by the state of Illinois was constitutional, in that the court "could not investigate or condemn the impolicy of a state law, and that this court is not a refuge from the mere injustice and oppression of state legislation." He then compared it to a Louisiana statute, which had been held to be constitutional, which discriminated between manufacturers and growers of sugar. And he concluded that there was no evidence for prohibiting the classification in this case. Mr. Justice Gray took no part in this decision.

² 184 U. S. 549. "This is not an action to enforce, or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms and companies in relation to the sale of Akron pipe. . . . The purchases by the defendants had no necessary or direct connection with the alleged illegal combination."

³ 184 U. S. 552. "It is sufficient to say that the action which it [the

Coming lastly to the Illinois trust law of 1893, the Justice, after an elaborate argument, came to the conclusion that, despite the necessity of classifications in laws and laying taxes, the classification permitting combinations in agriculture and stock raising, and forbidding all other combinations, was unreasonable and arbitrary and therefore contrary to the 14th amendment. Since then, the act was unconstitutional, no defense could be based on it, and the judgment of the circuit court in favor of the Union Sewer Pipe Company was affirmed.

*Bement v. National Harrow Co.*¹

The National Harrow Company of New Jersey, after selling to Bement the right to manufacture certain articles on which it had patents, brought suit against him for violating this agreement. Bement, in answer, claimed that the agreements made by the Harrow Company amounted to a monopoly, and were void under the Sherman act. A referee having decided that Bement had violated the contracts, the case came before the Supreme Court for decision whether or not the agreements were legal.

In his decision for this Court, Justice Peckham² stated Bement's contention to be that the contracts "prove a purpose and combination on the part of all the dealers

Sherman Law] authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are besides, unliquidated.

¹ *Fed. Anti-Trust Decisions*, vol. ii, p. 169; May 19, 1902; 186 U. S. 70.

² Mr. Justice Harlan, Mr. Justice Gray and Mr. Justice White took no part in this decision.

in patented harrows to control the manufacture, sale and price . . . and that such a contract or combination was and is void . . . because it is a violation of the federal statute upon the subject of trusts," and that the question was "whether these contracts . . . are void as a violation of the act of Congress."¹ Further, "the plaintiff . . . was at the time when these licenses were executed the absolute owner of the letters patent relating to the float-spring tooth harrow business. It was, therefore, the owner of a monopoly recognized by the Constitution and by the statutes of Congress."²

He then cited many cases, with certain exceptions of public carriers, to prove that "the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly," and that "the fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

After judging that these contracts affected interstate commerce, he came back to the original question. "It is true that it has been held by this Court that the act included any restraint of commerce, whether reasonable or unreasonable." . . . "But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof."³

But although the contracts named prices, and directly affected interstate commerce, he decided that the parties as owners of patents were legally entitled to do this. And he refused to agree that the contract unduly restrained commerce, but found that "it had no purpose

¹ 186 U. S. 84 *et seq.*

² 186 U. S. 88.

³ 186 U. S. 92.

to stifle competition in the harrow business more than the patent provided for."

Thus he found that the provision that plaintiff should not license any other person to make harrows of this kind was a proper protection to the licensee. On these grounds, the Justice rendered his decision upholding the monopoly privilege of a patent, in favor of the Harrow Company.

*Montague v. Lowry.*¹

Certain California dealers and eastern manufacturers of tiles, under the title of the Tile Mantel and Grate Association of California, agreed not to sell to outsiders any unset tiles, except at an increased price. And they imposed certain conditions on members, besides requiring a vote on the entrance of new members. Lowry had a good business and was injured by the formation of the association. He had never been a member, nor applied for membership.

The association claimed that it could not be forced to deal with Lowry. It fixed no prices, and was ready to deal with anyone on good terms. It insisted, further, that the sales of unset tiles were local, and not interstate, trade. Under these circumstances, Lowry brought suit against the association on the ground that it restrained trade, and constituted a monopoly.

Justice Peckham rendered the decision for the Supreme Court.² Having decided that the effect of the combination was to prevent a non-member from buying tiles from any manufacturer who was a member, and because all the manufacturers were members, he concluded that

¹ *Fed. Anti-Trust Decisions*, vol. ii, p. 327; Feb. 23, 1904; 193 U. S. 38.

² A unanimous decision.

trade was restrained. Brushing aside as unimportant the question of the amount of the trade, because it affected eastern manufacturers and California dealers, he found that it affected interstate trade.

Moreover, he found that membership was "arbitrarily determined by the association," and that certain conditions, such as carrying \$3000 worth of stock, were agreed to by the members, so that, even had Lowry applied for admission, he might have been refused.

Because, then "the consequences of non-membership were grave, if not disastrous, to the plaintiffs," and because "the agreement directly affected and restrained interstate commerce,"¹ judgment was rendered in favor of the plaintiff, and a fine imposed on the association.

*Northern Securities Company v. United States.*²

The facts of the Northern Securities case are so ably summarized by Justice Harlan in his decision, that his words cannot be improved upon.

Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company

¹ 193 U. S. 47.

² *Fed. Anti-Trust Decisions*, vol. ii, p. 338; Mch. 14, 1904; 193 U. S. 197.

was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held in one ownership. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease.¹

Considerable diversity of opinion marked the decision of the Supreme Court. The majority opinion was stated by Justice Harlan, with whom concurred Justices Brown, McKenna, and Day; Justice Brewer concurred in this judgment, but delivered a separate opinion. Justices

¹ 193 U. S. 325-6.

White and Holmes each delivered dissenting opinions, concurring, however, with each other; and Chief Justice Fuller and Justice Peckham concurred in these dissents.¹

Justice Harlan, after stating the case, proceeded first to inquire into the previous decisions of the Court under this statute, and found that ten propositions which affected this case, could be deduced from them. These ten propositions were:²

1. That although the statute had no reference to the manufacture and production of articles, it declared illegal

¹Justice White's dissenting opinion was based on the fact that the anti-trust act did not apply to the acquisition and ownership of stock, and that, if it did, Congress had no power to regulate such acquisition and ownership. This right, he contended, was reserved to the states, since ownership of stock was not interstate commerce. While Congress had the power to regulate instrumentalities of interstate commerce, as railroads, he insisted that this power was entirely distinct from the power to regulate the ownership of these instrumentalities; moreover, he distinguished sharply between a combination which might restrain commerce, and one which actually did restrain it, saying that the latter only was prohibited by the act.

Justice Holmes interpreted contracts in restraint of trade as those only which exerted extraneous restraint against strangers to the contract. "Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business (although in some cases carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as he otherwise would." And further, "combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business." [193 U. S. 404.]

Viewed in this way, this combination was not an attempt to monopolize, or a combination in restraint of trade, because it had done nothing to prevent strangers from competing with it. Even assuming that the purpose of the purchase was to suppress competition, yet the acts done in furtherance of this unlawful attempt were so remote as not to be prohibited. Competition being prevented by a fusion of the two roads, rendered it analogous to a partnership.

¹ 193 U. S. 331.

every combination, of whatever form or nature, which directly restrained trade or commerce among the states.

2. That the act was not limited to unreasonable restraints, but embraced all restraints.

3. That railroads, engaged in carrying commerce between the states, were included by the act.

4. That manufacturers' combinations, which restrained interstate commerce, were included.

5. That Congress, having the power, had established the rule of free competition to govern those engaged in interstate commerce.

6. That every combination which would restrain interstate commerce by extinguishing competition, was included.

7. That the natural effect of competition was to increase commerce, and that its prevention restrained and did not promote commerce.

8. That a combination, to fall under the act, need not wholly suppress competition, but need only tend to do so.

9. That the constitutional guarantee of liberty of contract did not prevent Congress from prescribing the rule of free competition to those engaged in interstate commerce.

10. That Congress had the power to enact the anti-trust law.

"The recognition of the principles announced in former cases," said Justice Harlan, "must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case are of a substantial character."¹

The first of these objections was that the Securities Company was a state corporation, and that its purchase

¹193 U. S. 332.

of the two railroads was consistent with its charter powers. As such, the enforcement of the Sherman act was "an unauthorized interference by the national government with the internal commerce of the states creating those corporations." With this, the Justice refused to concur. The act, he insisted, regulated only interstate commerce; it was within the power of Congress, and "not even a state, still less one of its artificial creatures, can stand in the way of its enforcement."

Next, it was objected that "whatever may be the powers of a state over such subjects, Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporations be engaged in interstate and international commerce,"¹ and that in regard to these matters, individuals were subject "only to the lawful authority of the state in which such citizens reside, or under whose laws such corporations are organized."² The government, on the other hand, contended that Congress might protect the freedom of commerce by any appropriate means, and that no state could stand in the way of the national will. It was the existence of a combination among the stockholders of competing railroads that the government complained of. If Congress might declare this combination illegal, "how far", asked the Judge, "might the courts go in giving effect to the act?" And quoting from the Constitution and many decisions of the Court on the complete power of Congress to regulate interstate commerce, "there ought not"³ he concluded "at this day to be any doubt as to the general scope of such power." Reiterating that Congress had applied the rule of free competition to interstate commerce, he insisted that such rule must be enforced.

Thirdly, it was said that railroads incorporated under

¹ 193 U. S. 333.

² 193 U. S. 334.

³ 193 U. S. 335.

the laws of a state could only be combined with the authority of the state. This contention the Justice dismissed with the remark that the states had not given their permission, and that even if they had, Congress might still prohibit roads engaged in interstate commerce from combining.

Fourth, the Court was asked to declare the Sherman law repugnant to the Constitution. With this, the Justice refused to concur, insisting that Congress had the power to prescribe the rules for interstate commerce.

Reverting to the question of how far the Court might go in enforcing the rule of Congress, he stated that the Tenth Amendment¹ was said to make the prevention of the combination an invasion of the rights of the states. This view the Justice dismissed as impossible. Upon the same grounds that Congress could enact the anti-trust law, he concluded, the Court could enforce it.² This simply affirmed that the government was actually more powerful than any combination, and that no pretexts might stand in the way of the execution of the laws.

The next objection, "that Congress did not intend to limit the power of the several states to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own and sell their stock" was answered by the reiteration that neither states nor combinations might interfere with the rules of Congress. The suggestions that enforcement of the act would bring about disastrous financial results were put to one side as untrue,

¹ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

² 193 U. S. 346. "In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce."

and, even if true, powerless to prevent the Court from carrying out the law.

The last contention, that the purchase of other stocks by the Northern Securities Company was simply an investment, and could not be forbidden by Congress, the Justice declared to be fallacious.

If it was, in form, such a transaction, it was not, in fact, one of that kind. However, that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose.¹

Turning, finally, to the nature of the relief to be granted to the government, the Justice affirmed the decree of the court below, that the Northern Securities Company be enjoined from acquiring more of the stock of either of the railways, and that it be enjoined from voting, or collecting dividends on these stocks. But the Securities Company was permitted to return either to the railway companies, or to its own stockholders, the shares of the railway companies which it held.

Mr. Justice Brewer's concurring opinion was remarkable in foreshadowing the future trend of the Court. He openly acknowledged a change in his point of view, asserting that while the former decisions had been just, they had been decided on a wrong basis.

Instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act.²

¹ 193 U. S. 354.

² 193 U. S. 361.

While admitting that each individual had the right to invest his wealth as he wished, he asserted that no such case was here presented. "There was a combination by several individuals separately owning stock in two competing railroad companies to place the control in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company." And further, he declared that "the prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock."¹ Such an arrangement opened the way for further combinations, which might vest control of vast properties in ever smaller units, until finally one group included the entire transportation system of the country. This, he declared, he could not consider a reasonable or lawful restraint of trade.

*Minnesota v. Northern Securities Co.*²

This was a complaint brought by the State of Minnesota against the Northern Securities Company of New Jersey and others, for combining the hitherto competing Great Northern and Northern Pacific Railways, and thereby lessening the value of certain lands owned by the state, which were dependent for their full development on competition between these roads. The suit was brought in a state court, and by consent of both parties, was transferred to a federal court, and so in course of time, came before the Supreme Court.

Justice Harlan spoke for the Court and applied himself to the question whether it was a suit of which the federal court could take cognizance, since it was brought by a

¹ 193 U. S. 362.

² *Fed. Anti-Trust Decisions*, vol. ii, p. 533; Apr. 11, 1904; 194 U. S. 48.

state. In the course of a lengthy examination of this question, the Justice said: "The injury on account of which the present suit was brought is at most only remote and indirect"; and if the state could bring suit, then every individual property holder might.

This view he rejected. "On the contrary, taking all the sections of the act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public . . . to those instituted in the name of the United States . . . under the direction of the Attorney General."¹

Consequently, the circuit court had no jurisdiction, and the case was returned to the state court.

*Field v. Barber Asphalt Co.*²

This was a suit brought by Mr. Richard H. Field to declare void a contract for paving certain streets, on the ground that it was unnecessary, and that the contracts called for Trinidad asphalt, thus preventing competition from other suitable kinds of asphalt, and violating the anti-trust act.

Mr. Justice Day spoke for the Supreme Court. Having decided that the other arguments were untenable, he said:

"The attempt to invoke the provisions of the Sherman act in this case is equally unavailing. . . . It is not intended to affect contracts which have a remote and indirect bearing upon commerce between the states."³

¹ 194 U. S. 71.

² *Fed. Anti-Trust Decisions*, vol. ii, p. 555; May 31, 1904; 194 U. S. 618.

³ 194 U. S. 623.

*Swift & Co. v. United States.*¹

This was a bill brought by the United States against Swift & Company, and a number of other corporations and firms, praying for relief from the situation created by the following charges against the defendants: 1. They were engaged in the business of buying live stock, slaughtering it, and converting it into fresh meat. 2. They sold this meat to many dealers in various states. 3. They also shipped this meat to their various agents, and (4) controlled six-tenths of the trade of the country, and (5) but for the acts charged, would be in free competition. 6. They have combined together not to bid against each other for cattle. 7. They raised the price to attract cattle to the market, and then, when it was there, conspired to reduce the price. 8. They also conspired to fix their selling prices, and forced dealers to maintain them by means of a black list. 9. They combined to fix prices for cartage. 10. With the intention of monopolizing, they received less than lawful rates from the railroads. 11. The defendants conspired to monopolize the fresh meat trade of the country. Against all these acts, the government prayed for relief. An injunction prohibiting all the actions charged, and "any other method or device, the purpose and effect of which is to restrain commerce as aforesaid" was granted by the circuit court before whom the case was heard.

This was appealed by Swift & Company, on many grounds, of which the chief were, indefiniteness, and the fact that the sale of meat was domestic, and not interstate, trade.

Justice Holmes,² in discussing the case, said that the

¹ *Fed. Anti-Trust Decisions*, vol. ii, p. 641; Jan. 30, 1905; 196 U. S. 375.

² A unanimous decision.

bill must be "taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech,"¹ and read in this way, he set aside the objection that the complaint was not definite. This, he said, was due to the vast and varied elements involved. "The scheme as a whole seems to us to be within reach of the law."

And he rejected the validity of regarding the acts as if they were separate from each other. "It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful." "The unity of the plan embraces all the parts." Moreover, "its effect upon commerce among the states is not accidental, secondary or remote." But rather "it is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted."

Having thus shown that the collectivity of the acts made a breach of the law, he took up the general injunction issued by the circuit court below, first deciding that the sale of meats in various states constituted interstate commerce, and that the charges made were not too vague. Under this head, he said: "Not every act that may be done with intent to produce an unlawful result, is unlawful, or constitutes an attempt. It is a question of proximity or degree."²

Regarded from this point of view, he decided that the injunction against the cattle dealers, modified only by striking out the phrase to prohibit "any other method or device," and limited to those methods charged in the complaint, should be affirmed.

¹ 196 U. S. 395 *et seq.*

² 196 U. S. 402.

*Harriman v. Northern Securities Co.*¹

This was a suit brought by Mr. Edward H. Harriman, representing the Oregon Short Line, to prohibit the plan of distribution proposed by the Northern Securities Company after its dissolution by the Supreme Court.

The plan proposed to exchange for its stock, a proportion of the shares of each of the two railroads, the Great Northern and the Northern Pacific, equal to the proportion of the Securities Company stocks returned. In this way, Messrs. Hill and Morgan, owning a majority of the Securities Company stock certificates, would receive a majority of the stock of each of the railroads, and Mr. Harriman would receive a minority in each railroad, instead of a majority of Northern Pacific stock, which he had formerly owned.

His contention was that the Northern Securities Company, having been declared unlawful, had been merely the custodian of his stock, and that it should return to him exactly that which he had placed in its custody. To this, the Securities Company replied that it had bought, and owned, the Northern Pacific stock formerly belonging to Mr. Harriman, and that it could distribute its property in any way that it chose. The government declared itself satisfied with the plan for dissolution.

Mr. Chief Justice Fuller delivered the unanimous opinion of the Court. After reviewing the facts, and the various decisions of the circuit courts at some length, he found that a sale of Northern Pacific stock had taken place, for money and Northern Securities Company stock, and that this sale had been complete in itself. Referring to the former decision of the Supreme Court, he said: "Some of our number thought that as the Securities Company owned

¹ *Fed. Anti-Trust Decisions*, vol. ii, p. 669; Apr. 3, 1905; 197 U. S. 244.

the stock, the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was.”¹

He also showed that Mr. Harriman had formerly testified as to the completeness of the sale, and that the company had power, “in the discretion of its directors and of the holders of two-thirds of its capital stock, at any time, on notice, to dissolve and to wind up the corporation, and distribute its assets.”² Finally, he said that: “The circuit court decrees put at rest any question that the ratable distribution resolved upon was in violation of public policy.”

And it is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock, and a ratable distribution of the remaining assets to the other Securities stockholders, would not only be in itself inequitable, but would directly contravene the object of the Sherman law and the purposes of the government suit.³

This statement was explained as meaning that the Northern Pacific was at the time in competition with the Union Pacific, and that the effect of the distribution proposed by Mr. Harriman would be to end that competition. It was thus a practical fact which the Court enunciated, and not a general principle for future dissolutions. Its object was to increase competition. The general effect of this decision was to emphasize that public policy was greater than individual rights. Knowledge of the law and facts were taken for granted, and no excuses of ignorance could avail.

¹ 197 U. S. 291.

² 197 U. S. 294.

³ 197 U. S. 297.

*Board of Trade of the City of Chicago v. Christie Grain & Stock Co.*¹

The facts of this case were that the Board of Trade recorded the prices paid in its halls for various commodities, and sent them, through the telegraph companies, to certain approved parties, bucket shops and betting establishments being excluded. In some unknown, illegal way, the Christie Grain and Stock Company was informed of these prices.

Passing by, as unimportant, whether either of these concerns was illegal as being a bucket shop, the Court decided that the Board of Trade should be maintained in its suit, since the quotations in its halls were its property, and nobody was entitled to steal them. As to the contracts with the telegraph companies, forbidding them from transmitting quotations to parties not approved by the Board of Trade; Mr. Justice Holmes speaking for the Court² decided these did not come under the act of 1890, since there was no attempt at monopoly in limiting communications to certain people, which need have been communicated to no one. Consequently, the right of the Board of Trade was upheld.

*Hale v. Henkel.*³

*McAllister v. Henkel, United States Marshall.*⁴

*Nelson v. United States.*⁵

¹ *Fed. Anti-Trust Decisions*, vol. ii, p. 717; May 8, 1905; 198 U. S. 236.

² Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Day dissented from this opinion.

³ *Fed. Anti-Trust Decisions*, vol. ii, p. 874; Mch. 12, 1906; 201 U. S. 43.

⁴ *Ibid.*, p. 916; Mch. 12, 1906; 201 U. S. 90.

⁵ *Ibid.*, p. 920; Mch. 12, 1906; 201 U. S. 92.

*Alexander v. United States.*¹

These four cases came but indirectly under the anti-trust act. They established the important principle that immunity against divulging incriminating evidence was personal to the individual, and did not extend to the corporation with which the witness was connected. In this way, they were of momentous importance in the prosecution of cases against corporations.

*Chattanooga Foundry & Pipe Works v. City of Atlanta.*²

This was a suit brought by the City of Atlanta against the Chattanooga Foundry and Pipe Works, to recover an excess of price for certain pipes, which the city had been led to pay by the semblance of competition created by the Addyston Pipe Combination. The Foundry Company claimed immunity on the ground of delay in bringing the suit, but this was overruled.

Mr. Justice Holmes delivered the opinion of the Court.³ He decided that a city was a person within the meaning of the act, and that it was injured in its property by having to pay the excess price. "Congress had power to give an action for damages to an individual who suffers by breach of the law,"⁴ and "Finally, the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540) in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong."

By thus liberalizing the interpretation, the Supreme

¹ *Fed. Anti-Trust Decisions*, vol. ii, p. 945; Mch. 12, 1906; 201 U. S. 117.

² *Ibid.*, vol. iii, p. 113; Dec. 3, 1906; 203 U. S. 390.

³ Mr. Chief Justice Fuller and Mr. Justice Peckham dissented.

⁴ 203 U. S. 396-7.

Court sustained the decree of the circuit court of awarding to the city triple the excess price and attorney's fee.

Loewe v. Lawlor.¹

This was a suit brought by Loewe, a manufacturer of hats, against Lawlor and the United Hatters of North America, a labor organization, forming a part of the American Federation of Labor, to recover damages inflicted on him by that organization, in its attempt to force him to employ only union labor in his factory. On his refusal to "unionize" his factory, they instituted a boycott, which successfully prevented him from employing other laborers, and also from selling his product for which he had formerly found a market throughout the United States. By these means his business was injured to the extent of \$80,000. The completeness of the boycott was such as to ruin his business, and by the same methods the organization had already forced seventy of the eighty-two hat factories in the country to employ union labor.

The facts were admitted, and the question was whether they constituted a case under the Sherman act. This the Court in a unanimous opinion delivered by Chief Justice Fuller, decided in the affirmative.

In our opinion, the combination described in the declaration is a combination in restraint of trade or commerce among the several states, in the sense in which those words are used in the act, and the action can be maintained accordingly.

And that conclusion rests on many judgments of this Court, to the effect that the act prohibits any combination whatever, to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business.²

¹ *Fed. Anti-Trust Decisions*, vol. iii, p. 324; Feb. 3, 1908; 208 U. S. 274.

² 208 U. S. 292-3.

He then dismissed various objections: that intrastate business was also included, which, he said, was negligible in quantity; that physical obstruction was not alleged, which he said was not necessary; and that the defendants were not engaged in interstate commerce, which he answered by stating that "the act made no distinction between classes, and that every obstruction was illegal."

On all these grounds, the case came within the statute, and plaintiffs were awarded damages.

*Shawnee Compress Co. v. Anderson.*¹

This was a suit brought in Oklahoma by certain stockholders of the Shawnee Company to cancel a lease made by that company of all its property to the Gulf Compress Company, on the ground that the officers of their company had no right to execute the lease, and had done so for personal considerations; and that the Gulf Company intended in this way to secure a monopoly of the business of compressing cotton. The supreme court of the territory found in favor of the plaintiff, on the ground that the lease would tend to secure the Gulf Company in its monopoly of compressing cotton.

Mr. Justice McKenna delivered the unanimous opinion of the Supreme Court. In spite of the fact that the Shawnee Company was financially embarrassed, and aided by making the lease, he sustained this judgment, on the ground that the former covenanted to aid the latter by not entering the field against it, and pledging itself "to render every assistance to prevent others from entering it."² Of this, he said, "The first effect would necessarily be the cessation of competition. If there was left a possibility of other compresses being constructed, it was made less by

¹ *Fed. Anti-Trust Decisions*, vol. iii, p. 357; Apr. 13, 1908; 204 U. S. 423.

² 209 U. S. 433.

the power that could be opposed to them.”¹ Coming to the effect of the Sherman act on this case, he reiterated that “it has been decided that not only unreasonable but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law,” and later, he decided that the principle governing the contract was that “The restraint upon one of the parties must not be greater than protection to the other party requires.”²

On these grounds, the Court affirmed the decision canceling the lease.

*Continental Wall Paper Co. v. Louis Voight & Sons Co.*³

The Wall Paper Company, in this case, sued a retailer, Voight & Sons Company, for a balance of money due to itself; in defense of the non-payment of which the retailer made several answers, of which the most important was that the Wall Paper Company was a combination formed in 1898 to monopolize and restrain trade. This combination was composed of over thirty formerly competing firms, and controlled 98% of the wall-paper industry of the country, thus regulating prices, products, patterns and terms of sale to jobbers. These, the plaintiff averred, were unreasonable and unjust.

Justice Harlan rendered the opinion of the Court.⁴

¹ 209 U. S. 433-4.

² 209 U. S. 434-5.

³ *Fed. Anti-Trust Decisions*, vol. iii, p. 480; Feb. 1, 1909; 212 U. S. 227.

⁴ Mr. Justice Holmes, with whom concurred Mr. Justice Brewer, Mr. Justice White and Mr. Justice Peckham, dissented from this opinion.

Mr. Justice Holmes' ground was that the sales themselves were legal transactions, and not connected with the legality of the combination. And further, he held that the contract between the two concerns was legal. “The plaintiff's unlawful purpose did not make it unlawful to buy the plaintiff's goods.” In these respects, he held the present case

After explaining the Sherman act as forbidding every contract, he stated: "That the combination represented by the plaintiff company is within the prohibition of the above act of Congress is clear from the facts admitted by the demurrer."¹ He then pointed out the difference between this and the Connolly case. In that case, the purchaser had no connection with the combination, and his purchase was a thing apart. In this case, the purchase directly carried out the object of the combination.

To quote his summing up:

Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends.²

In such a case the benefit of the defendant was unimportant when compared to the principle involved of sanctioning an illegal contract. He then reiterated the former decisions of the Court that in any case "the Court will not be restricted to a partial statement of the facts, but will consider all the circumstances connected with the transaction so as to ascertain its real nature." Viewed in this broad way, he decided that the plaintiff could have no redress.

to be analogous to that of *Connolly v. Union Sewer Pipe Company*. "There, as here, there was, or was assumed to be, an illegal trust."

Concurring in these views, Mr. Justice Brewer added that the anti-trust act prescribed three remedies—criminal prosecution, forfeiture of property, and triple damages in case of injury. But the defendant, instead of seeking any of these remedies, simply wished to be excused from a debt. This, he considered, was not a just remedy because the defendant had re-sold these goods at a higher price, and had not been injured in his property.

¹ 212 U. S. 255.

² 212 U. S. 262.

*American Banana Co. v. United Fruit Co.*¹

This was a suit brought by the American Banana Company against the United Fruit Company to recover damages alleged to have been done to its property in Panama by Costa Rica at the instigation of the latter company, to secure it in its monopoly of the banana trade.

The Supreme Court in an opinion delivered by Justice Holmes held that these acts were done under the jurisdiction of foreign states, and that the influence of the Sherman act was limited to the United States, even though the acts were done by citizens of this country and injuriously affected other citizens of the United States.

*United States v. Kissel and Harned.*²

In this case the American Sugar Company through the defendant Kissel, loaned to the Pennsylvania Sugar Company, a sum of money, and obtained, as collateral, sufficient stock to allow it to vote that the latter company should discontinue in business. It pleaded that this act was done more than three years before the filing of the suit by the United States, and that by the statute of limitations, it was immune.

But Mr. Justice Holmes held, for the Supreme Court,³ that a conspiracy did not end with the act of conspiring, but continued as long as it had effect, and that the effect of the conspiracy lasted until the filing of the suit. "Where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue and not be a special plea."⁴

¹ *Fed. Anti-Trust Decisions*, vol. iii, p. 648; Apr. 26, 1909; 213 U. S. 347.

² *Ibid.*, vol. iii, p. 816; Dec. 12, 1910; 218 U. S. 601.

³ Unanimous decision.

⁴ 218 U. S. 610.

The Supreme Court decided only that a conspiracy could have continuance, and did not consider the larger aspects of the suit.

*The Dr. Miles Medical Co. v. John D. Park & Sons Co.*¹

The Dr. Miles Medical Company was a manufacturer of patent medicines, which it sold to wholesale jobbers and retailers. These sales were made under contracts not to resell under certain prices fixed by the manufacturer, and only those jobbers and retailers who signed such contracts could obtain the medicines. The Medical Company alleged that the John D. Park & Sons Company, a jobber, who had not signed a contract, had induced other favored jobbers, unknown to the Medical Company, to sell medicines to it at cut prices, and had resold, without a contract, to certain retailers, who were thus also enabled to sell at cut prices. Against this practice, an injunction was prayed for, on the ground that the sale of their goods at "cut prices" hurt their business with other retailers, and damaged their reputation with the public. The defendant demurred to the bill for want of equity, and was sustained in the lower courts, from which an appeal was taken. Thus, the bill came before the Supreme Court, for which Mr. Justice Hughes delivered the opinion.²

He came at once to the principal question—that of the validity of the restrictive agreements. The first inquiry

¹ *Fed. Anti-Trust Decisions*, vol. iv, p. 1; Apr. 3, 1911; 220 U. S. 373.

² Mr. Justice Holmes, in a dissenting opinion, based on the view that the retail dealer was an agent of the manufacturer, and not the owner of the goods, accurately measured the significance of this decision. "There is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the Court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere." Mr. Justice Lurton took no part in this decision.

was whether the jobber was the agent of the manufacturer whose goods he sold, or the owner of those goods which he sold for himself. After an exhaustive study into all the aspects of this question, he decided that the wholesale dealer must be regarded as the owner of the goods, which he had bought for resale. He then examined the nature of the contracts, explaining them as

a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition,¹

and declared it to be obvious that they restrained interstate trade.

Next, he took up the two main contentions of the complainant that these restrictions did not fall under the Sherman act. The first, that these restrictions were valid because they related to proprietary medicines manufactured under a secret process, he dismissed on the ground that a secret process was not protected by law as was a patent, and that it did not imply a right to control competition among retail dealers.

Coming to the second, that a manufacturer was entitled to control the prices on all sales of his own products, he explained the view of the Court at some length before reaching a conclusion. He first decided that "because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction."² Nor could he, by rule and notice, fix prices for future sales. In this connection, he said :

¹ 220 U. S. 399.

² 220 U. S. 404.

With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee, otherwise, restraints of trade are void as against public policy.¹

Regarded from this point of view, he decided that there was no difference between a contract entered by the manufacturer and each dealer to fix the retail price, and a combination of dealers with the same object in view, and as the latter would obviously be harmful to the public, so also was the former.

Therefore, these contracts were adjudged to be invalid both at common law and under the act of 1890.

*Standard Oil Co. of New Jersey v. United States.*²

The suit brought by the United States against the Standard Oil Company involved such a mass of detailed facts, extending over a period of some forty years, that it seems scarcely possible to bring it within the limits of this volume in an intelligible manner. The testimony taken for the case alone covered 12,000 pages, which was printed in twenty-three volumes.

The Court, in an epoch-making opinion delivered by Chief Justice White, first summarized the facts.³ Briefly,

¹ 220 U. S. 406.

² *Fed. Anti-Trust Decisions*, vol. iv, p. 79; May 15, 1911; 221 U. S. 1.

³ Mr. Justice Harlan delivered a separate opinion, though concurring in the decision of the Court. He stated his views "because the Court by its decision, when interpreted by the language of its opinion, has not only upset the long-settled interpretation of the act, but has usurped the

the charge was that the defendants, the Standard Oil Company of New Jersey and thirty-three other corporations, together with certain individuals, "were engaged in conspiring to restrain the trade and commerce in petroleum . . . and the products of petroleum . . . and to monopolize said commerce."¹ The conspiracy was alleged to have been formed about 1870, and to have continued up to the present in varying forms, which occupied three periods, the first from 1870 to 1882, the second from 1882 to 1899, and the third since 1899. In the first period, the monopoly was gained by the acquirement of practically all the oil refineries in the country, the obtaining of preferential rates and rebates for transportation, and the control of pipe lines which carried the crude oil to the refineries. The second period was marked by the creation of a trust proper. All the property was valued, and put in the hands of nine trustees, who issued trust certificates to the original owners. In the third period, the form of combination was changed from that of a trust, to a holding corporation. This corporation was chartered in the State of New Jersey, so liberally that it obtained the right to engage in practically every form of business, including the right to hold the stock of other corporations. In each of these forms, the combination was averred to have monopolized and restrained interstate commerce, by means which the Chief Justice grouped under the following heads:²

Rebates, preferences and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair constitutional functions of the legislative branch of the government." Quoting the language of the act, and many subsequent decisions, he insisted that the Court had no right to introduce the word "reasonable" into the act, and that it was a dangerous usurpation of legislative power.

¹ 221 U. S. 31.² 221 U. S. 43-4.

tices against competing pipe lines ; contracts with competitors in restraint of trade ; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition ; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent ; the division of the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed ; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Company as a result of the alleged monopoly ; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination.

The Chief Justice then quoted from the summing-up of the brief of the company.¹ While admitting many of the acquisitions of property, they denied the fact of conspiracy, and particularly the charge that the trust of 1882 was a combination of independent and competing concerns. The means charged in the monopolization of the industry were generally denied.

After reviewing the history of the suit in the federal courts, and commenting on the complete antagonism of the views of the two parties, the Chief Justice proceeded

¹ 221 U. S. 44. "It is sufficient to say that, whilst admitting many of the alleged acquisitions of property, the formation of the so-called trust of 1882, its dissolution in 1892, and the acquisition by the Standard Oil Company of New Jersey of the stocks of the various corporations in 1899, they deny all the allegations respecting combinations or conspiracies to restrain or monopolize the oil trade ; and particularly that the so-called trust of 1882, or the acquisition of the shares of the defendant companies by the Standard Oil Company of New Jersey in 1899 was a combination of independent or competing concerns or corporations. The averments of the petition respecting the means adopted to monopolize the oil trade are traversed either by a denial of the acts alleged or of their purpose, intent, or effect."

to his own analysis of the case. His investigation, he announced, was to be divided under four heads: ¹ First, the text of the first and second sections of the act originally considered, and its meaning in the light of the common law, and the law of this country at the time of its adoption; Second, the contentions of the parties concerning the act, and the scope and effect of the decisions of this Court upon which they relied; Third, the application of the statute to facts; and, Fourth, the remedy, if any, to be afforded as the result of such application.

First: The text of the act and its meaning. A review of the congressional debates of 1890 led to the conclusion that

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the second section is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.²

From a rapid review of the English and the American law he decided that monopolies were unlawful at common law, because of their restriction to individual freedom and injury to the public; that the freedom of the individual was restricted and injured when the character of the deal resulted in an enhancement of price; that both in the interest of the individual and the public, a contract whereby an individual put an unreasonable restraint upon himself, was void. And that at common law, monopoly, on account of its effects, was spoken of as a restraint of trade. This was true in both countries. While monopoly by an act of

¹ 221 U. S. 49.

² 221 U. S. 50-1.

sovereignty was not considered a danger in the United States, still acts in restraint of trade, as amounting to monopoly, were generally feared on account of their evil effects.¹ The word "monopolize," was defined as acts which unduly diminished competition and enhanced prices. Such acts were sought to be prevented in many ways—constitutional amendments, acts of legislatures and judicial decisions.

The Chief Justice then pointed out

that as modern conditions arose, the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrongs which it had been the purpose to prevent from the beginning.²

In this way, were prohibited all contracts or acts which were unreasonably restrictive of competitive conditions; and the decisions, depending as they did on economic conditions, at one time treated as valid contracts which, at another time, and under other conditions, were adjudged invalid.³

¹ 221 U. S. 55. "As it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed, not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result."

² 221 U. S. 57.

³ 221 U. S. 58. "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the

Coming then, to an interpretation of the first section of the statute, the Chief Justice decided (1) that it was drawn up in the light of the existing practical conception of the law of restraint of trade, since it included acts which were attempts to monopolize; (2) that in view of the new forms of combinations and contracts which were being evolved from existing economic conditions, any form by which an undue restraint of commerce was brought about, was included in the condemnation of the act; and (3) that since the acts embraced in the condemnation were not specifically defined, and that any act done anywhere in the field of human activity was illegal, if it was in restraint of trade, the exercise of judgment, in determining whether any specific act violated the law, was called for. The standard by which such conclusion was to be reached was not specified, though indubitably contemplated, and this could be none other than the standard of reason, for the purpose of adjudging whether any case had or had not brought about the wrong against which the statute provided.

An interpretation of the second section showed that "it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into, or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character."

the first section be frustrated or evaded." Having explained that "monopolization" and "restraint of trade" were used synonymously, he stated that

when the second section is thus harmonized with and made as it was intended to be the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve.

And he concluded by remarking that the act indicated a consciousness that monopoly could be best prevented by a strict maintainance of the freedom to contract, and the sharp prohibition of unlawful contracts having a monopolistic tendency or unduly restraining trade.

Before applying these principles to the case in question, the Chief Justice paused to consider the contentions concerning the meaning of the statute urged by the two parties. He first summarized the view of the government:

That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposed the plain duty of applying its prohibitions to every case within its literal language.¹

And then he pointed out that this assumed every contract to be in restraint of trade, which was not the case. The following of this contention would preclude the only way by which acts included within the statute could be ascertained, that is, by the light of reason. And he explained at length how the Freight Association and the Joint Traffic cases, when taken as a whole, bore out the interpretation

¹ 221 U. S. 63.

that reason was used in arriving at the conclusions to which the Court came at that time.

Turning to the views urged for the defendant, he pointed out: first, that the contention that the act could not be constitutionally applied, since this would extend the power over production within the states, had been disposed of by the decisions of the Court later than the Knight case; and second, that the argument that the act could not be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade, which was protected by the constitutional guaranty of due process of law, was unsound if the act were reasonably applied—in that it could only be sound if the act were applied without reason. And following out these propositions to their logical conclusion, they meant that “it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision,”¹ which was obviously absurd.

Having thus disposed of the contentions of both parties, the Chief Justice turned to the facts of the case, and the application of the statute to them. The facts were (1) the formation of the Standard Oil Company of Ohio; (2) the organization of the trust; and (3) the New Jersey corporation and its acquisition of the shares of the other corporations. And he sustained the decision of the court below, that these acts operated not only to destroy the potentiality of competition, but were also a conspiracy in restraint of trade, in violation of the first section of the act, and a monopolization, bringing about a perennial violation of the second section, for the following reasons:

(a) Because the unification of so vast a power and control in the New Jersey corporation caused a *prima-facie* presumption of a combination in restraint of trade.

¹ 221 U. S. 69.

(b) Because this presumption was made conclusive by considering the conduct of those who brought about the combination, both before and after its consummation.

In fact, he concluded, the matter could not be impartially examined, without leading irresistibly to the opinion that the whole intent and purpose of the organization was to achieve and maintain a monopoly in the oil business.

Coming then to the last question, the remedy to be administered, the Chief Justice explained that it must be two-fold in character :

1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2nd. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.¹

Before applying the remedies, the Chief Justice first considered the relief recommended by the court below. This court determined that the New Jersey corporation, in so far as it held the stock of the other corporations, was a combination in violation of the act. It commanded a dissolution of the corporation—, in effect, a return of the stock to the stockholders of the various subsidiary corporations. To make this effective, the holding corporation was forbidden from exercising any rights of ownership of the stocks, and the subsidiary corporations were forbidden to pay any dividends to the holding corporation. After this dissolution, the subsidiary corporations were enjoined from in any way conspiring to violate the act, and were forbidden to do any acts which might tend to bring about a monopoly. Pending the execution, all defendants were

¹ 221 U. S. 78.

forbidden from engaging in interstate commerce, a delay of thirty days, however, being allowed before this order went into effect.

The first part of this decree, the Chief Justice held to be appropriate. Also, after explaining that the injunction against the subsidiary corporations, from combining to violate the law, meant only unlawful combinations, and not normal and lawful contracts or agreements, he held this decision to be just. However, in view of the magnitude of the interests, he decided that the time allowed for the dissolution to become effective was too short, and should be extended from thirty days to six months. And, considering the possible injury to the public, he adjudged improper the decree to suspend interstate commerce until the dissolution should have been effected.

Thus modified, the Chief Justice, concluded that the decree below was right, and should be affirmed.

*American Tobacco Company v. United States.*¹

The decision in this case followed closely on the heels of the Standard Oil decision. Like that case, the opinion was rendered by Chief Justice White, with the concurrence of the entire bench, Justice Harlan alone dissenting, not with the decision, but in the detail of reasoning.² The first part of this decision, involving as it did the decree of the court below, may be passed over. Both parties appealed from the decision, and as the Supreme Court came to its own conclusions, we may commence with the independent investigation as outlined by the Chief Justice. His opinion was divided into three parts: first, the undisputed facts;

¹ *Fed. Anti-Trust Decisions*, vol. iv, p. 168; May 29, 1911; 221 U. S. 106.

² Justice Harlan's dissent was first with the decree. He considered that the Supreme Court should itself have named the details which would prohibit the evil of the combination; and he again protested against the application of the "rule of reason" in interpreting the act.

second, the meaning of the anti-trust act and its application as correctly construed to the ultimate conclusions of fact deducible from the proof; and third, the remedies to be applied.

Taking up, first, the undisputed facts, the Chief Justice examined the period up to the organization of the Continental Tobacco Company in 1898. Before 1890, he found that competition was very severe, both in the purchase of the raw leaf, and in the sale of the product. In that year five concerns, controlling practically all the production of cigarettes, united in the formation of the American Tobacco Company. This company, during the next eight years, pursued a policy of purchasing other plants, with the purpose of gaining control over plug tobacco. This was accompanied by extraordinarily severe competition, which however was successful, and resulted in the formation of the Continental Tobacco Company, a new concern including the old American Tobacco Company, and the leading manufacturers of plug tobacco.

The same policy was continued after 1898. The consolidation bought some thirty competing businesses in the following year, some of which were closed, and others carried on as ostensible competitors. In this connection, the Chief Justice called attention to the enormous expenditure of money for plants which were immediately closed, and the similarity of policy which had been pursued ever since the first consolidation in 1890.

In 1901, all the companies were again merged in the Consolidated Tobacco Company, a new holding corporation, which, through stock-ownership, completely centralized the control of the industry. And in 1904, the last merger of the companies took place under the name of the American Tobacco Company. This company continued the policy of buying up competitors, some of whose plants

it closed, and others it ran as if they were independent competitors. And the Chief Justice concluded that the same method and policy had characterized the consolidation at all times and under all its various names.

He then passed to the second question, the construction of the anti-trust act, and its application to this case.

If the anti-trust act [he said] is applicable to the entire situation here presented, and is adequate to afford complete relief for the evils which the United States insists that situation presents, it can only be because that law will be given a more comprehensive application than has been affixed to it in any previous decision.¹

This was because, setting aside the power gained by a corporation through stock-ownership in other corporations, there would yet remain to be settled the question whether that corporation, in and of itself, was in violation of the law. For such a construction, the literal interpretation of the act, insisted on by the United States, would be inadequate, since many of the corporations depended for their power, not on a consolidation, but on a purchase of property. The interpretation insisted upon by the Tobacco Company would be equally inadequate. For it insisted that, under the letter of the law, the forms by which the properties were acquired were excluded from the act, and that each act, judged singly, was for the purpose of advancing, and not obstructing trade.

To escape from this dilemma, the Chief Justice reverted to the construction given to the statute in the Standard Oil case. "In that case, it was held, without departing from any previous decision of the Court, that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only

¹ 221 U. S. 175.

be discharged by a resort to reason.”¹ And after defending this view at some length, he concluded that “the soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt.”

Applying this rule, it first became plain that the particular form of the assailed transaction was of no importance. And a consideration of the undisputed facts “overwhelmingly” resulted in the verdict that they were within the prohibitions of the statute.

We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists,²

but because: (a) The first combination was impelled by a fierce trade war; (b) The acts of this combination showed that it used its power further to monopolize the industry by driving competitors out of business or bringing them into the combination; (c) Consciousness of wrong-doing was shown by the changing of the name and form of the combination, despite its uniform policy of restraining others and monopolizing the industry; (d) Control was gradually absorbed over all the elements of tobacco products, through seemingly independent corporations; (e) Enormous sums were expended in buying plants, not for productive purposes, but to close them; (f) Contracts were repeatedly made (whose isolated legality was not here considered) whereby manufacturers bound themselves not to compete in the future.

Coming lastly, to the remedy to be applied to a combina-

¹ 221 U. S. 178-9.

² 221 U. S. 182.

tion, which "as a whole, involving all its co-operating or associated parts, in whatever form clothed, constitutes a restraint of trade within the first section, and an attempt to monopolize or a monopolization within the second section of the anti-trust act",¹ the Chief Justice stated that the relief required must be broad in its nature, and must involve both permanent relief and temporary relief pending the working-out of this solution.

The three purposes of giving complete effect to the statute, harming as little as possible the general public, and protecting innocent stockholders, must further guide the form of the remedy applied. The difficulty was still more increased by the facts that a prohibition of stock ownership would afford only partial relief, because the complexity of the scheme made it impossible to formulate a remedy which would at all restore former conditions, and because the scheme of unification was so involved that any specific order might either injure the public or perpetuate the combination.

He then discussed as improper the plans of issuing a blanket injunction against further combination or of appointing a receiver for the whole property, and decreed as follows:

1. That the combination was in restraint of trade.
2. That the court below be ordered to arrange with the combination a new condition of affairs which should be honestly in harmony with the law.
3. That six months be allowed to complete this arrangement, with an extension of sixty days, if necessary.
4. That in case no arrangement was made, the court below should either prohibit interstate commerce to all members of the combination by means of an injunction, or appoint a receiver over the whole property.

¹ 221 U. S. 184.

Pending the adjustment, all of the defendants were restrained from in any way enlarging the power of the combination.

*United States v. St. Louis Terminal Association.*¹

The Terminal Association was formed in 1889 by various railroads entering St. Louis, for the purpose of combining several independent terminal companies, and operating them as one system. However, there soon entered into competition with it two other companies, open to all railroads, which kept the entry into St. Louis open for other railroads. Shortly after, the Terminal Association bought control of its two competitors, and combined the three systems. It was against this consolidation that the United States brought suit.

Mr. Justice Lurton rendered the decision for the Supreme Court.² Whether this case was included under the Sherman act, he said, depended on the "intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted."³

From a detailed study of the peculiar location of St. Louis, whose connecting bridges are dependent on railroad lines to connect them with the depots, he found that all roads entering the city were absolutely dependent on the facilities offered by the Terminal Association, and therefore at the mercy of those roads which controlled the Association. Thus the purpose of unification was the restraint of commerce. And while there was no evidence

¹ 224 U. S. 383, April 22, 1912.

² Mr. Justice Holmes took no part in this decision.

³ 224 U. S. 395.

that the proprietary companies had availed themselves of their power to impede competition, still their ability to do so, if they wished, was plain.

Although admitting that the existence of terminal associations was a great benefit, yet the methods and contracts in this case were so framed as to unify control and make a restraint of commerce easily possible. And finding that the combination "would not be an illegal restraint, under the terms of the statute if it were what is claimed for it, a proper Terminal Association acting as the impartial agent of every line which is under compulsion to use its instrumentalities,"¹ the Court ordered that the agreement be so altered as to constitute it a bona-fide agent and servant of every railroad which wished to use its facilities. This task was given to the district court, with instructions to pass on the plan of reorganization adopted by the Terminal Association.

*United States v. Standard Sanitary Manufacturing Co.*²

This was a suit by the government against sixteen corporations engaged in the manufacture of enameled ironware, charging an agreement between them, whereby they "subjected themselves to certain rules and regulations, among others not to sell their product to the jobbers, except at a price fixed, not by trade and competitive conditions, but by the decision of the committee of six of their number." Moreover, the jobbers were brought into the combination, and their loyalty assured by a system of benefits and penalties. The extent of the consolidation was shown by its manufacture of 85% of the total trade of the country and its control of over 90% of the wholesale dealers.

¹ 221 U. S. 410.

² Decided Nov. 16, 1912.

The defense was that previous to the combination, the trade had been in a very bad position because of the selling of poor qualities by the rivals of the Sanitary Company; and that the combination was nothing but a legal sale of patent rights. These rights, indeed, were given on condition that no inferior articles should be put on the market, and that they should be sold at an agreed standard price.

But Mr. Justice McKenna, in delivering the opinion of the Court, after a lengthy inquiry into the agreement between the manufacturers, found that the provisions were such as to restrict prices and competition. Especially, he found fault with the manner of fixing prices, and the restrictive contracts which the jobbers were forced to sign before being allowed to handle their articles. These conditions, the Justice decided, went beyond the rights granted by patents, and accomplished a restraint of trade. And no disguise of form could serve as an excuse. "Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it maybe, of some good results."

*United States v. The Union Pacific Railroad Co.*¹

This case grew out of the purchase by the Union Pacific Railroad, through one of its proprietary companies, the Oregon Short Line, of 46% of the stock of the Southern Pacific Company. The government contended that prior to this purchase, the two companies were in competition, and acted independently, and that subsequently, the Union Pacific had dominated over the affairs of the Southern Pacific to eliminate competition, and create a monopoly.

¹ Decided Dec. 2, 1912.

Mr. Justice Day delivered the opinion of the Supreme Court.¹ Certain constructions, he said, have been positively settled: the act applied to interstate railroads; the act was intended to reach combinations which restrained freedom of action or the play of competition in interstate commerce; competition, not combination, should be the law of trade; the statute should be given a reasonable construction.

Accordingly "a combination which placed railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act." And the form of the combination was of no importance. Moreover, the legality of the purchase under state law, constituted no defense if it were against the Sherman law.

And then he set aside the contention that the two roads had not been in competition before the purchase. If they had not been as to rates, they had been as to superiority of service and accommodation; and this was destroyed.

Nor does it make any difference that rates for the time being may not be raised, and much money be spent in improvements after the combination is effected. It is the scope of such combinations and the power to suppress or stifle competition or create monopoly which determines the applicability of the act.

And then the Justice, after disposing of various technicalities, reached the conclusion that the purpose of the whole transaction was to unify the control of the two roads, and that ownership of 46% of the Southern Pacific stock was sufficient for this purpose.

The application of relief must conform to two rules:

¹ Mr. Justice Vandeventer took no part in this decision.

first, the forbidding of like acts in the future; and second, the effectual dissolution of the combination. And he ordered such disposition of the stock as would meet the approval of the district court, within three months time.

*United States v. The Reading Company et al.*¹

This was a suit brought by the United States against several railroad companies which were engaged in the mining and transportation of anthracite coal, chiefly in the state of Pennsylvania, and which were alleged to have formed a combination for the purpose of regulating prices and conditions, in restraint of trade.

Mr. Justice Lurton delivered the opinion of the Supreme Court.² The evidence was scant, and disunited. However, the case divided itself clearly into two parts: the arrangements between the railroad companies, which also mined 75% of the coal supply, and the arrangements between the railroad companies and the independent mining companies, which mined 20% of the total supply. There were, besides, certain contracts between individual railroads and mining companies, which, however, were held not to be of a sufficiently general nature to be part of the scheme.

The arrangement between the railroads was solidified in 1898 through the formation of the Temple Iron Company. At this time, many contracts of the independents with the railroads were about to expire, and they formed the project of building a new, independent railroad to handle their coal. However, the railroads, on hearing of this plan, combined through the instrumentality of the Temple Iron Company, to purchase enough of the mines of the independents to prevent this, and retain control among them-

¹ Decided Dec. 16, 1912.

² Mr. Justice Day, Mr. Justice Hughes and Mr. Justice Pitney neither heard nor participated in this case.

selves; although they were, by the law of Pennsylvania, permitted to transport and mine coal, their restraint of trade was not thereby rendered legal.

So long as the defendants are able to exercise the power thus illegally acquired, it may be most efficiently exerted for the continued and further suppression of competition. Through it, the defendants, in combination, may absorb the remaining output of the independent producers. The evil is in the combination.

The board of directors included the presidents of all the railroad companies, thus rendering easy any private agreements between them. This was accordingly adjudged to be a combination in restraint of trade.

The arrangements between the railroads and the "independent shippers" were next looked into. It was found that prior to 1900, each shipper made short-term contracts, on such conditions as he was able, with the various railroads. Thereafter, in pursuit of a concerted plan, the railroads offered to all shippers so-called 65% contracts; that is, the payment to the independents of 65% of the selling price of their coal at tide water. By this means, the independents gained slightly, the difference being the price paid by the railroads "for the privilege of controlling the sale of the independent output, so as to prevent it from selling in competition with the output of their own mines."

It is not essential [said the Justice] that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. But a series of such contracts, if the result of a concerted plan or plot, between the defendants to thereby secure control of the sale of the independent coal in the markets of other states, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within

the terms of the statute, and as parts of the scheme or plot would be unlawful.

Moreover, he decided that the evidence was clear proof of the fact that the contracts were the result of conferences between committees, the independent shippers and the railroads. And he quoted at length the evidence which led him to this conclusion.

And after pointing to the Standard Oil Company decision to show that the act "does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose," he found that this case was of "such an unreasonable character as to be within the authority of a long line of cases decided by this court."

*United States v. James A. Patten, et al.*¹

The charge brought by the government against Mr. Patten was a conspiracy and restraint of trade in order to affect abnormally the price of cotton, an article of interstate commerce, whose price was practically fixed by the transactions on the New York Cotton Exchange. The method used by the conspirators was averred to be the purchase of quantities of cotton for future delivery, greatly in excess of the amount available, with the "necessary and unavoidable result" that cotton manufacturers were compelled to pay an excessive price to obtain cotton; in this way, by means of a "corner", an unlawful obstruction was put upon interstate commerce. "Running a corner" was agreed by both parties to consist of "acquiring control of all or the dominant portion of a commodity with the purpose of artificially enhancing the price, one of the important features of which . . . is the purchase for future delivery

¹ Decided Jan. 6, 1913.

coupled with a withholding from sale for a limited time." And the question was whether this was within the terms of the anti-trust act.

The defendants urged that it was not, because, first, the members were not engaged in interstate commerce; second, running a corner tended, at least temporarily, to stimulate, and not to restrain, trade; and third, the obstruction of interstate commerce, even if a necessary result, was not a direct one.

But Mr. Justice Vandeventer, speaking for the Court,¹ refused to agree to these arguments. Section one of the act, he decided, included all acts, whether they were voluntary or involuntary restraints, which impeded commerce; and while a "corner" might temporarily stimulate commerce, yet it thwarted "the usual operation of the laws of supply and demand," and produced the same evils as suppression of competition. Moreover, he declared that the commerce affected was interstate commerce, and that it was directly affected.

And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this Court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary.

And closing with the words: "It hardly needs the statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole," the Justice decided that the act embraced the conspiracy as charged.

¹ Chief Justice White, Mr. Justice Lurton and Mr. Justice Holmes dissented.

*United States v. Union Pacific Railroad Company, on motion as to form of mandate.*¹

In pursuance of its opinion of December 2d, 1912, the Supreme Court was asked by both parties,

to instruct the United States District Court for the District of Utah, by a provision incorporated in the mandate of this Court, when issued, or otherwise, whether or not a sale of the Southern Pacific Company shares held by said appellees to the shareholders of appellee Union Railroad Company, substantially in proportion to their respective holdings, or a distribution thereof by dividend to the Union Pacific stockholders entitled to such dividend, would, in the opinion of the Court, constitute a disposition of said shares in compliance with the opinion herein filed on December 2, 1912.

The Company believed that this would effectually conclude the combination. This, moreover, was the method adopted in the Northern Securities case, and in the Standard Oil case. But Mr. Justice Day, speaking for the Court, refused to be bound by these precedents.

As was said in the opinion filed in this case, however, each case under the Sherman act must stand upon its own facts, and we are unable to regard the decrees in the Northern Securities Company case and the Standard Oil Company case as precedents to be followed now, in view of the different situation presented for consideration.

And no credence was given to the alleged wide distribution of ownership. While the Union Pacific Company had 22,000 stockholders, the Justice found that 68 stockholders owned 44% of the stock, and 300 others owned 18.8% of it. Thus, 368 persons controlled 62.8% of all the stock of the Company, so that the consolidation might well be perpetuated.

¹ Decided January 6, 1913.

The main purpose of the act is to forbid combinations and conspiracies in undue restraint of trade or tending to monopolize it, and the object of proceedings of this character is to decree, by as effectual means as a court may, the end of such unlawful combinations and conspiracies.

The proposed plan, therefore, was held not to end the combination so effectually as to comply with the decree of the Court.

*United States v. Sidney W. Winslow, Edward P. Hurd, George W. Brown, William Barbour, and Elmer P. Howe.*¹

This was a criminal indictment brought by the government against the above named gentlemen, who were manufacturers of shoe machinery, charging them with having formed a combination in restraint of trade of themselves, and a conspiracy in restraint of trade of others, shoe manufacturers. Through patents, the defendants had separately largely controlled the manufacture of machines for different processes in the making of shoes, such as lasting machines, welt sewing machines, heeling and metallic fastening machines. In 1899, they had joined together under the name of the United Shoe Machinery Company, to make all these different kinds of machines. This company leased its machines to manufacturers of shoes "on the conditions that unless the shoe manufacturers use only machines of the kind mentioned furnished by the defendants, or if they use any such machines furnished by other machinery makers, then all machines let by the defendants shall be taken away."

Mr. Justice Holmes, in rendering the unanimous opinion of the Court, found that because these conditions in the leases were not alleged to have been contemporaneous with

¹ Decided February 13, 1913.

the formation of the company, the question was "whether that combination taken by itself was within the penalties of the Sherman act"; at this time, the validity of the leases was not involved.¹ Since, then, the combination was simply an effort after greater efficiency, and the machines, being patented, were monopolies in any case; and since they had not competed with each other before the consolidation, the collective business was unchanged by the fact of consolidation.

The cases now pending before the courts, under the Sherman act, the decisions of which will further explain the policy of the government, are as follows:²

U. S. v. American Naval Stores Company et al. (criminal suit).

U. S. v. Great Lakes Towing Company et al.

U. S. v. Chicago Butter & Egg Board.

U. S. v. American Sugar Refining Company et al.

U. S. v. Purrington et al.

U. S. v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft et al.

U. S. v. William C. Geer, President, Albia Box and Paper Company, and 16 other officials of various companies.

U. S. v. Eastern States Retail Lumber Dealers Association.

U. S. v. Isaac Whiting, John K. Whiting, Charles A. Hood, Edward J. Hood, and William A. Graustein, and William A. Hunter, Secretary of Producers' Co. (The Milk Trust).

U. S. v. Periodical Publishing Company.

U. S. v. Lake Shore & Michigan Southern R. R., Chesapeake & Ohio R. R., Hocking Valley R. R., Toledo & Ohio Central Ry., Kanawha & Michigan Ry., Zanesville & Western R. R., and others.

U. S. v. Edward E. Hartwick et al.

¹The question of the validity of the leases is now pending before the Court.

²This list, including all cases pending on March 4, 1913, was courteously compiled by the Department of Justice.

U. S. *v.* The Colorado and Wyoming Lumber Dealers' Association and The Lumber Secretaries' Bureau of Information.

U. S. *v.* Willard G. Hollis et al.

U. S. *v.* United States Steel Corporation and others.

U. S. *v.* Joe Cotton, Smith Cotton, Walter Barlow, et al.

U. S. *v.* National Cash Register Co. et al.

U. S. *v.* United Shoe Machinery Co. et al.

U. S. *v.* The Keystone Watch Case Company et al.

U. S. *v.* American Naval Stores Company et al. (civil suit).

U. S. *v.* New Departure Manufacturing Company et al.

U. S. *v.* John H. Patterson et al.

U. S. *v.* American-Asiatic Steamship Company et al.

U. S. *v.* International Harvester Company et al.

U. S. *v.* Prince Line (Limited) et al.

U. S. *v.* The Master Horseshoers' National Protective Association of America, and others.

U. S. *v.* Elgin Board of Trade et al.

U. S. *v.* Charles S. Mellen, Edson J. Chamberlin, and Alfred W. Smithers.

U. S. *v.* Kellogg Toasted Corn Flake Company et al.

U. S. *v.* Associated Billposters and Distributors of the United States and Canada et al.

U. S. *v.* Motion Picture Patents Company et al.

U. S. *v.* Consolidated Rendering Company et al.

U. S. *v.* The Southern Wholesale Grocers' Association et al.

U. S. *v.* Board of Trade of the City of Chicago et al.

U. S. *v.* The Cleveland Stone Company et al.

U. S. *v.* The Delaware, Lackawanna & Western Railroad Company and The Delaware, Lackawanna & Western Coal Company.

U. S. *v.* The McCaskey Register Company et al.

U. S. *v.* International Brotherhood of Electrical Workers, Local Unions Nos. 9 and 134 et al.

U. S. *v.* Corn Products Refining Company et al.

U. S. *v.* American Thread Company et al.

U. S. *v.* Terminal Railroad Association of St. Louis et al.

CHAPTER V

ANALYSIS OF THE GOVERNMENT POLICIES

It must be confessed at the outset that at best a study of the policies of the government in regard to monopoly is unsatisfactory. No definite policy has ever been laid down and adhered to; rather, fragmentary hints from the three branches of the government must be pieced together, with due allowance for difference of time and condition, and the ability of each branch to make its views dominant in the policy of the whole. The scattered views and expressions of opinion on each question of Congress, the President or the Attorney-General, and the Supreme Court, must be carefully collected and the attempt made to read into the isolated phrases only what their contexts justify, and to give them a proper weight according to the effect they may have, either in showing a trend of opinion, or in expressing a general policy.

Towards this policy, Congress has contributed little beyond the Sherman act itself. Its debates may be characterized as negative in result. Even the Sherman act, as it passed Congress, was so fraught with uncertainty and vagueness that it required many decisions of the Supreme Court to give it a positive quality. The only important departure from this negative attitude was its creation of the Bureau of Corporations.

More positive in its views, and yet without power to force them on the country, the Executive has occupied an unfortunate position. President Harrison did not deal with the question after the passage of the Sherman act;

President Cleveland trusted to state action; President McKinley was so taken up with foreign policies and other seemingly more important questions as to give to the trusts but scant consideration; President Roosevelt, on the whole, failed to carry his views through Congress, and President Taft appeared satisfied with present conditions, or at any rate was unable to put through his plan of federal incorporation.

We turn, then, to the Supreme Court in our search for a definite policy; and here, indeed, we are not disappointed. Viewed broadly, their economic grasp of the trust problem may be termed wise and progressive. Throughout the twenty years over which their decisions extend, they have shown a readiness to adopt new standards and new criteria, as the true economic basis of existing monopolies has become clear. The detailed examination of the economic basis of the government attitude is thus largely, though not wholly, concerned with the views expressed by this Court.

The terminology touching this subject is in a confused state. A combination is considered a collection of persons or corporations who, by an agreement, more or less binding, work in concert. Any person, corporation, or combination which has monopoly power is referred to as a monopoly. Monopoly power is considered such a degree of control over an article as to permit the fixing of the price in accordance with the law of maximum return; that is, the price is not subject to the law of competition. A restraint of trade is concerted action which prevents free competition, and tends to fix the price in a monopolistic manner.

In this aspect, monopoly and restraint of trade are different sides of the same problem. A monopoly represents a condition whereby prices are controlled; a restraint is the act (or acts) which brings this about. Monopoly, however, is the more inclusive term. It always must signify a re-

straint of trade; on the other hand, a restraint of trade may not lead to monopoly.

This chapter is divided into two parts. First are considered the policies which the government has adopted in regard to the forbidding of combinations, and next, the policies of the government more directly concerned with the methods by which monopolies should be treated.

PART I

Part one is mainly concerned with the questions of why combinations have been forbidden, and what kind of combinations have been forbidden. This portion of the study groups itself around the government's attitude towards five questions:

First, the policy in regard to competition and monopoly.

Second, reasons which have caused the formation of combinations.

Third, the policy in regard to the condemnation of certain acts or of monopolies as such.

Fourth, the policy in regard to the classification of monopolies.

Fifth, the standard which should be applied in testing the legality of restraint of trade.

The policy in regard to competition and monopoly

That competition was necessarily good, and monopoly bad, was the view repeatedly expressed in the Senate, from Senator Sherman's opening speech, in which he described the bill as "a remedial statute to enforce, by civil process in the courts of the United States, the common law against monopolies",¹ to Senator Edmund's last speech, in which he declared himself in favor of repressing, breaking up, and forever destroying monopolies.² With the single exception

¹ *Congr. Rec.*, 1890, vol. xxi, p. 2456.

² *Ibid.*, p. 2726.

of Senator Stewart, of Nevada, these statements were endorsed by all the speakers.

The attempt made by the Senate to establish the rule of "just and reasonable" as the standard for the rates fixed by combination in transportation was rejected in the House, so that, as the bill went through, no possibility of good through combination was recognized. It is worthy of passing note that under the principle of efficacy of competition, and inevitable harm of combination, the interstate commerce act of 1887 had been passed. Consequently, we see in the legislation of Congress this principle clearly enunciated.

It was further developed by the Supreme Court. In the Freight Association case this view was clearly expressed. As the Court stated:

- If there be any competition, the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable.¹

Combinations, on the other hand, were held to be necessarily bad, even though they might permanently lower prices, on the social ground of converting independent small business men into servants of a corporation, and also on the ground that it was harmful for any article to be subject to the sole will of one powerful combination.

In the Joint Traffic case, this policy was reiterated. After denying that freedom of contract included the right to combine as one consolidated and powerful association, the Court said,

even though the rates provided in the agreement may for the time be not more than are reasonable, they may easily and at any time be increased. It is the combination of these large

¹ 166 U. S. 339.

and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil.¹

The Court, thereupon, took up the question of the benefit of competition. It outlined the argument of the railroads that competition led to the ruin of one or other of the competitors, thus leaving the field free to the victor. To this argument, however, it refused to agree, saying that "the natural, direct and immediate effect of competition is to lower rates," and, pointing to the many instances of railroads operating without agreements, it concluded that "it cannot be said that destructive competition, or, in other words, war to the death, is bound to result unless an agreement or combination to avoid it is entered into."²

In the *Addyston* case, the same position was again taken. In this regard the Court said: "The question is as to the effect of such combination upon the trade in the article, and if that effect be to destroy competition and thus advance the price, the combination is one in restraint of trade."³

In the *Bement* case, the Court departed from its usual policy of upholding all competition, and acknowledged that under certain circumstances—i. e., the patent of an invention—a monopoly was legally justifiable. The evident conclusion from this is that monopoly may, under certain conditions, be socially advantageous. The Court, however, recognized for these conditions, only a patented invention. It did not extend the argument to include any other form of monopoly.

Again, the policy was clearly enunciated in the *Northern Securities* case.

¹ 171 U. S. 571.

² 171 U. S. 577.

³ 175 U. S. 245.

The means employed in respect of the combinations forbidden by the anti-trust act, and which Congress deemed germane to the end to be accomplished, was to prescribe as a rule for interstate and international commerce (not for domestic commerce), that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the anti-trust act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition.¹

Following this doctrine in the *Harriman v. Northern Securities Company* case, the plan of dissolution proposed by Mr. Harriman was rejected because it would tend to reduce the competition then existing between the Union Pacific and Northern Pacific Railroads. This, it was declared, "would directly contravene the object of the Sherman law, and the purposes of the government suit."²

In the *Shawnee Compress* case, the Court nullified the lease to the larger company on the ground that "the first effect would necessarily be the cessation of competition." Again, in the *Dr. Miles Medical Company* case, because a system which eliminated all competition had the same effect as a combination of retailers, the plan was declared invalid.

The *Standard Oil* and *American Tobacco* cases were based on the doctrine that monopoly must inevitably be harmful to the public, and that the restoration of competitive conditions would insure the safeguarding of the common interest. The acts of both of these companies were found to have destroyed the potentiality of competition by the formation of a monopoly; this monopoly was, therefore, dissolved.

¹ 193 U. S. 337.

² 197 U. S. 297.

In the *Union Pacific* case, in discussing the form of the mandate,¹ the Court declared that

the main purpose of the act is to forbid combination and conspiracies in undue restraint of trade or tending to monopolize it, and the object of proceedings of this character is to decree, by as effectual means as a court may, the end of such unlawful combinations and conspiracies.²

And in the *Patten* case,³ the Court again proclaimed its policy to be the assurance of competition.

It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

Throughout the entire period, then, the policy of the government has been to regard competition as beneficial. It has deemed free competition to be a sufficient, if not a perfect, regulator of prices. The whole energy of the government, therefore, has been bent on the insurance of competition. In all its discussion of monopoly, its evil has been taken for granted. However, we must be careful to remember that by this the government has always referred to a monopoly having complete power, and never to a monopoly subject to regulation.

¹ Jan. 6, 1913.

² In its original decision, on Dec. 2, 1912, the Court said: "To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting the statute, and the courts should construe the law with a view to effecting the object of its enactment."

³ Jan. 6, 1913.

For the recognition that this may exist, we have but to turn to the interstate commerce acts, and to the patent acts. These, however, lie rather outside of the field of this study. In connection with industrial monopoly, this idea seems to have been strictly excluded, and the discussion limited to the question of free competition *versus* absolute monopoly, with the decision unanimously favoring the former. This fact is clarified by the reasons which have been declared by the government to be the causes for the forming of combinations.

The reasons which have caused the formation of combinations

A study of the *Congressional Record* shows the motives assigned by the authors of the Sherman bill for the formation of trusts to be mainly anti-social.

Senator Sherman made various statements in this regard. While he said in one place, "In providing a remedy, the intention of the combination is immaterial; the intention of a corporation cannot be proven,"¹ and later spoke of the great benefits which corporations, especially those of a quasi-public nature, had brought about through the cheapening of production, still the combinations he was dealing with he described in vivid language as formed solely for the objects of making competition impossible, of controlling the market, of raising or lowering the prices, according to their selfish interests. "Its governing motive," he asserted, "is to increase the profits of the parties composing it,"² and again, "The sole object of such a combination is to make competition impossible."

The possible advantages of combinations were quite lost sight of in the later discussions. Every page of the debates

¹ *Congr. Rec.*, 1890, vol. xxi, p. 2456.

² *Ibid.*, p. 2457.

is filled with complaints of increased prices and wrongs inflicted on the public by combinations. The Reagan bill,¹ which was added *in toto* to the original Sherman bill, specifically prohibited certain acts of combinations, which acts, evidently, combinations were created to perform. Since this bill was endorsed by a large majority of the Senate, it shows clearly the trend of thought at that time. The acts prohibited were the prevention of competition, and the altering of prices.

In the House, also, there was unanimity of opinion concerning the evil purposes of the trusts. Mr. Wilson described them as being formed only when production had outstripped consumption, in order to raise prices, and Mr. Taylor, although differing with Mr. Wilson in his tariff views, nevertheless agreed in describing a trust as the "monster who robs the farmer on one hand, and the consumer on the other." These opinions are merely typical of all the speeches with which the pages of the *Congressional Record* are filled previous to the passage of the act. Consequently, it is concluded that the attitude of Congress towards combinations was thoroughly hostile—that it regarded them as existing for the sole purpose of robbing the general public. This view was accordingly taken over by the Supreme Court.

In the Joint Traffic case, it declared that

the agreement affects inter-state commerce by destroying competition and by maintaining rates above what competition might produce. If it did not do that, its existence would be useless, and it would soon be rescinded, or abandoned. Its acknowledged purpose is to maintain rates, and if executed, it does so.²

¹ *Congr. Rec.*, 1890, vol. xxi, p. 2611.

² 171 U. S. 569.

In the Addyston Pipe case, the Court again clearly announced its belief that the reason for a combination was to obtain higher prices, in the following language:

The combination thus had a direct, immediate and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction, the resulting high prices for the pipe could not have been obtained.¹

Again, the Court said that the sole purpose for the formation of the Northern Securities Company was the suppression of competition. To quote from the language of Justice Harlan:

All the stock it [the Securities Company] held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose.²

The cessation of competition was a chief factor in the decision of the Shawnee Compress Company case. The larger Gulf Compress Company had bought the smaller one, which at the same time contracted not to re-enter the industry, and to aid the other. "The first effect," the Court declared, "would necessarily be the cessation of competition."³

In the Standard Oil case, the Court went further and assigned reasons for the formation of combinations in addition to that of increasing prices. An examination of past laws led to the conclusion

that as to necessities of life the freedom of the individual to

¹ 175 U. S. 243.

² 193 U. S. 354.

³ 209 U. S. 433.

deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which result from monopoly, that is, an undue enhancement of price.¹

Later, in discussing the facts of the case, the Chief Justice decided that the change which had taken place through the acquisition of the stocks of the other corporations by the New Jersey corporation,

when analyzed in the light of the proof, we think, establishes that the result of enlarging the capital stock of the New Jersey company and giving it the vast power to which we have referred produced its normal consequence, that is, it gave to the corporation, despite enormous dividends and despite the dropping out of certain corporations enumerated in the decree of the court below, an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products.²

This sentence indicates that not only was the object of raising prices considered to be sought by combinations, but also the acquisition of power. The power thus gained was later explained as being used to destroy "the potentiality of competition" which otherwise would have existed. This reason for the formation of the corporation is further shown in the summary of its acts, "solely as an aid for discovering intent and purpose." By acts which "necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view," the reason was revealed. The desire to gain control of the industry, and thereby affect prices, was then held to be one of the reasons for forming a combination.

¹ 221 U. S. 54.

² 221 U. S. 71.

The government policy, we must conclude, has been steadfast in its imputation of anti-social motives for the formation of combinations. The acquisition of power, the driving of competitors from the field, and the raising of prices, have been the sole motives recognized by it. No where does its attitude show any acknowledgment of such benefits as the increase of efficiency, the lowering of costs, and the escape from a ruinous competition. If these have ever been reasons in the formation of combinations, their legitimacy has never been considered.¹

*The policy in regard to the condemnation of certain acts
or of monopolies as such*²

It is well-nigh impossible to determine whether Congress

¹ President Taft, in a special message to Congress on January 7, 1910 [*H. R. Doc.*, 408, 61st Cong., 1st sess.], gave his opinion of the causes for combinations. These were, first, the possibilities of great economies; second, the reduction of excessive competition by a union of competitors, and third, the possibility of securing a monopoly and completely controlling prices. This, opinion, however, is interesting only as coming from the President; it cannot be said to have dictated the policy of the government.

One other possible cause, which has received considerable attention in Congress, is the connection of trusts and the tariff. This has never played a part in determining the policy of the government, but has rather been a point of dispute in party politics; since the Republicans have steadfastly denied all connection between them, and have been practically continuously in power since 1890, it is clear that the government policy has followed this view.

² The exact nature of this inquiry seems to require rather more explanation. The same act may have different results as it is performed under different conditions. For instance, price-cutting under conditions of competition between two fairly-balanced competitors, is of social benefit; but price-cutting by a powerful combination, which ruins all competitors and establishes a monopoly, is a social evil. This inquiry is directed to the ascertainment of the fact whether the policy of the government has been to regard certain acts as in themselves evil, or whether it has condemned monopolies regardless of their acts or of their social consequences.

had in mind the effect of particular acts, or whether they wished to put a stop to monopoly as such; if the questions had been put in concrete form at that time, there are few data to enable the student to decide how Congress would have answered them. On the whole, however, the purpose of Congress seems to have been to prevent monopoly as such. Certain acts were of course associated with monopoly, and the effort was made to prohibit it more specifically by enumerating these acts. But the keynote of the law was the cessation of monopoly.

This intention may be traced back to Senator Sherman's first bill; it was clearly aimed at anything which might obstruct competition, without reference to particular acts. The hope of the author was for liberal interpretation by the courts, to carry out the spirit of the bill in preventing monopoly.¹ The main objections to this proposal were based on its probable unconstitutionality; and the acceptance of the Reagan substitute seems to show that certain acts were the objects of attack; but a more careful analysis shows that this enumeration was supposed to include all the evils of which combinations were capable, and that this more definite form carried out the original idea.

In its final form the bill was couched in terms which seemed to insure the return of competition; by its all-inclusive wording, no aspect of monopoly whatsoever appeared to escape the ban. The words "or otherwise" made possible the inclusion of any kind of combination which might appear to the court to be harmful; complete freedom of interpretation was permitted.

But the Court was not prepared to accept this view at once. It was more simple and logical, to consider monopoly due to certain acts, than to construe the results of those

¹ *Congr. Rec.*, vol. xxi, 1890, p. 2456.

acts. In the Knight case, this view was distinctly held. The entire effect of the combination, which was a monopolization of the manufacture of sugar, was held secondary to the particular acts of the corporation in the acquisition of that monopoly. These acts were considered legal, and consequently the whole combination was considered legal.

Shortly after, however, the combination began to be considered more as a whole. This was first shown in the Joint Traffic Association case. The Court at this time did not consider the specific acts of the Association, although it admitted that these were reasonable. But it condemned the very existence of so vast and powerful a combination.

It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and prohibit.¹

And again in the Addyston case, the Court dismissed as unimportant the question whether the prices charged were reasonable or not, concluding that "its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so."²

However, in the Connolly case, the Court again turned to the specific acts, to the exclusion of general tendencies. Here it examined merely the contract of sale for certain sewer pipes. This contract, considered by itself, it held to be legal, even though the contract of combination were illegal. The single act of sale was of importance; the validity of the combination was another question. In the language of the Court:

¹ 171 U. S. 571.

² 175 U. S. 238.

It is sufficient to say that the action which it [the Sherman law] authorizes must be a direct one, and the damages claimed cannot be set-off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are besides, unliquidated.¹

Hereafter, however, the doctrine of the unity of all the separate parts was clearly enunciated in every case. Again and again, the Court refused to regard single acts by themselves, and insisted on viewing the combination as a whole.

In the case of *Montague v. Lowry*, the Court refused to consider the sale of unset tiles in California as a transaction wholly within the state (which, viewed narrowly, it was), but insisted that this was but a part of the entire scheme. The plan, and not the sales in California, were the determining features.²

The point was further developed in the *Northern Securi-*

¹ 184 U. S. 552.

² 193 U. S. 45, 46. "It is urged that the sale of unset tiles, provided for in the seventh section of the by-laws, is a transaction wholly within the state of California and is not in any event a violation of the act of Congress which applies only to commerce between the states. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of unset tiles by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the state of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce."

ties case. Here the question was plainly one of conflict between acts, in themselves legal, and the combination itself.

"Independently of any question of the mere ownership of stock or of the organization of a state corporation," the Court asked, "can it in reason be said that such a combination is not embraced by the very terms of the anti-trust act? May not Congress declare that *combination* to be illegal?"¹ And these questions the Court answered in the affirmative.

The decision of Justice Holmes in the Swift case was even more emphatic in this regard. He refused absolutely to judge of individual acts, confining himself to the effect of the combination taken in its entirety.

"It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful."² And further he reiterated that "the unity of the plan embraces all the parts." The next decisions but reaffirmed this policy.

In the case of the Chattanooga Foundry & Pipe Works *v.* City of Atlanta, in which the city sued for the excess of price which it had been led to pay for pipe through the membership of the company in a combination, the Court held that the high price was so bound up with the rest of the plan of the combination that it constituted a wrong, and that, therefore, the city was entitled to a refund of triple the excess of price which it had been led to pay by the combination.

Again, in the Wall Paper case, the retailer was excused from his debt for articles bought from the combination on the ground that this would carry out the plan of the combination. "The Court will not be restricted to a partial statement of the facts, but will consider all the circum-

¹ 193 U. S. 335.

² 196 U. S. 396.

stances connected with the transaction to ascertain its real nature.”¹ Viewed in this broad way, the advantage to the retailer was held to be of secondary importance when compared to the evil of the combination.

In the Standard Oil case, the Chief Justice reviewed the transition which had taken place.² Since the fear of enhancement of price was the cause of legislation, those acts which brought this about were prohibited. But with changed economic conditions, these same acts might be rendered harmless. It was, therefore, necessary to consider the conditions surrounding acts, in order to determine whether they unreasonably restrained trade, and brought about that condition which it was the purpose of the legislation to prohibit.³

In conformity with this view, the Court reiterated, in the Union Pacific case, the doctrine already announced, putting aside as unimportant the particular acts done. On the contrary, “it is the scope of such combinations, and their power to suppress or stifle competition or create monopoly which determine the applicability of the act.”

In the Reading case, the Court laid down its decree with great definiteness. It clearly emphasized the importance of the unity of the arrangement to the detriment of the particular acts done.

It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other states, and thereby suppress competition in

¹ 212 U. S. 266.

² 221 U. S. 58.

³ *Cf.* the Joint Traffic case, 171 U. S. 571.

prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful.¹

And lastly, in the Patten cotton-corner case, the policy was taken for granted. The Court dismissed with short notice the argument that the conspiracy only affected brokers, and not interstate commerce, with the words:

It hardly needs the statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.²

This, then, embodies the present policy of the government. The Court was forced to abandon as impracticable its original conception, that certain acts and practices were to be prohibited. The questions presented to it were of too complex a nature to permit of any such simple doctrine; and to meet adequately cases which very evidently were intended to fall under the ban of the law, a broader policy was necessary.

But echoes of the discarded doctrine still are heard. The LaFollette bill of January 30, 1912,³ and the Stanley measure⁴ of the same year both enumerated a series of acts which they prohibited. It may well be that this conception will dominate the policy of the government in the future. This is the more probable in view of the fact that the "seven sister" acts, passed in the state of New Jersey, on February 19th, 1913, and said to embody the views of President Wilson, contain an enumeration of specific acts

¹ Dec. 16, 1912.

² Jan. 6, 1913.

³ *Congr. Rec.*, 62nd Congr., 2nd sess., s. 4931.

⁴ *H. Rept.*, no. 1127, 62nd Congr., 2nd sess.

which, if done by "agreements between corporations, firms, or persons," constitute a trust and are prohibited.¹

The policy in regard to the classification of monopolies

In 1890, Congress rejected all schemes of classification of monopolies, save only that indispensable one, the differentiation of local and interstate commerce. This classification was made, not for economic reasons, but for legal ones. By the Constitution, Congress had no power over intrastate commerce, but only over that between the states or with a foreign country. By the wording of the act, "every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states or with foreign nations," was declared

¹ *State of New Jersey*, chapter 13, laws of 1913.

A trust is a combination or agreement between corporations, firms or persons, any two or more of them, for the following purposes, and such trust is hereby declared to be illegal and indictable:

(1) To create or carry out restrictions in trade or to acquire a monopoly, either in intrastate or interstate business or commerce.

(2) To limit or reduce the production or increase the price of merchandise or of any commodity.

(3) To prevent competition in manufacturing, making, transporting, selling and purchasing of merchandise, produce or any commodity.

(4) To fix at any standard or figure, whereby its price to the public or consumer shall in any manner be controlled, any article or commodity or merchandise, produce or commerce intended for sale, use or consumption in this state or elsewhere.

(5) To make any agreement by which they directly or indirectly preclude a free and unrestricted competition among themselves, or any purchaser or consumers, in the sale or transportation of any article or commodity, either by pooling, withholding from the market or selling at a fixed price, or in any other manner by which the price might be affected.

(6) To make any secret oral agreement or arrive at an understanding without express agreement by which they directly or indirectly preclude a free and unrestricted competition among themselves, or any purchaser or consumer, in the sale or transportation of any article, either by pooling, withholding from the market, or selling at a fixed price, or in any other manner by which the price might be affected.

illegal. Certainly, here was no classification of combinations, or seeming chance to deduce a classification.

In fact, in reaching the above wording, Congress specifically refused to consider certain proposed classifications. It rejected the plan to exclude combinations of labor from the general prohibitions; it refused to make any distinction between combinations of industry and those of transportation; and it failed to agree on the proposal that these be adjudged as to their rates on a standard of justice and reasonableness.

The distinction between interstate commerce and that within a state, was broadened by the Supreme Court in the Knight case. After deciding that "the power to regulate commerce . . . is a power independent of the power to suppress monopoly",¹ and that Congress had not the latter power and could only suppress monopoly incidentally in its regulation of interstate commerce, the Court decided that a monopoly of manufacturing lay beyond the power of Congress. The Court even went further than this. "No distinction,"² it said, "is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce." It was on the ground that this distinction marked the difference between local and interstate trade, that the case was decided. The Court was not satisfied with the legal distinction; it attempted to justify it on economic grounds.

In the Debs case, while justifying its condemnation of a combination of labor on other grounds than that of the Sherman act, the Supreme Court still declared that it found no fault with the decision of the circuit court which had held this combination to fall under the ban of the act.

The next classification which the Court was called upon to decide was that between railroads and commercial in-

¹ 156 U. S. 12,

² 156 U. S. 14.

dustry. In the Freight Association case, the Court was asked to declare that the business of railroading was so fundamentally different from that of trade, that the act could not be held to apply to it. While admitting certain of these distinctions, and the more public nature of the former than the latter, still, the Court refused to make the desired classification. "The language of the act,"¹ it decided, "includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations." And it went on to say that these contracts need not be in the form of trusts, placing great emphasis on the words, "or otherwise," and concluding that "all combinations which are in restraint of trade, or commerce are prohibited, whether in the form of trusts, or in any other form whatever."²

This decision would seem to leave no loophole of escape for any combination of any sort. But the Court soon showed that its original distinction between local and interstate commerce was still valid. In the Hopkins case, it decided that this difference was illustrated by that between a facility to commerce and commerce. On the ground that the former is a service performed and paid for, not directly connected with interstate commerce, the Court declared legal the Kansas City Live Stock Exchange. In order to leave no doubt of this distinction, the Court cited other combinations which would be valid under the act. Examples of such are:

An agreement among the land owners along the line not to lease their lands for less than a certain sum, even though cattle, when transported long distances by rail, require rest, food and water, and must be taken from the car and put in

¹ 166 U. S. 312.

² 166 U. S. 326.

pens to give them these accommodations. This would hold even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations.

An agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price, because the cattle must have corn for food. Or an agreement among the men not to perform the service of watering the cattle for less than a certain compensation.

An agreement between the builders of cattle cars not to build them under a certain price, even though the effect might be to increase the price of transportation of cattle between the states.

An agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at the place of their destination to the cattle yards where they were to be sold, for less than a minimum charge.

An agreement among themselves by locomotive engineers, firemen, or trainmen engaged in the service of an interstate railroad, not to work for less than a certain named compensation, even though the cost of transporting interstate freight would be thereby enhanced.

The theory underlying this classification was stated as being that "their effect is either indirect or else they relate to charges for the use of facilities furnished."¹ Charges for facilities furnished, then, were held to be essentially different from charges made in the course of interstate commerce, and this difference exempted the first charges from the ban of the Sherman act.

In the *Anderson* case, the Court, to some extent, reiterated and broadened this distinction. It now decided that the agreement was not entered into to regulate interstate commerce, but the business in which the parties were en-

¹ 171 U. S. 594.

gaged.¹ This classification was again held to be valid, and the distinction between such an agreement and one to regulate interstate commerce was deemed sufficient to permit of their differentiation. In the Hopkins case, the Court rested its decision on the fact that the business of the defendants was not interstate commerce; in the Anderson case, it neglected this fact, and said that even if the business were interstate commerce, still, because the agreement regulated the business itself, and not interstate commerce, as a whole, it did not fall within the scope of the law.

The classification announced then, may be interpreted as that between interstate commerce in general, and a local business in particular; as that restraint which affects other businesses, and that which affects only one business. In the first case, the restraint on interstate commerce was direct; in the second, it was indirect and incidental.

From now on, however, the Court refused to sanction classification of any sort. Anticipating a little, in the Standard Oil case, the Court very definitely stated that its distinction in the Knight case was an unsound one. Referring to this case, the Chief Justice then said:

The view, however, which the argument takes of that case, and the arguments based upon that view, have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the anti-trust act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice.²

In the Connolly case,³ the Court was called upon to ex-

¹ 171 U. S. 616. "The effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose and object."

² 221 U. S. 68.

³ 184 U. S. 540.

amine the validity of a statute of the state of Illinois, which declared invalid all combinations, excepting those in the industries of stockraising and agriculture. This classification the Court declared to be unreasonable and arbitrary, and despite its recognition of the necessity of classification in the making of the laws, it declared the entire act unconstitutional on this account.

In the Northern Securities case, the Court was asked to make a classification excluding that corporation from the ban of the act. This was on the ground that the Company legally held the stocks of the two railroads, and that it was within the rights granted to it by its state charter. But no such classification was recognized; state law was subservient to federal law, and this form of combination, also, was covered by the act.

The Court went even further in the case of *Loewe v. Lawler*. At this time it refused to consider the validity of any sort of classification whatsoever. It swept away all distinctions of the kinds of obstructions placed on interstate commerce, whether physical or otherwise. It answered the argument that the trade union was not itself engaged in interstate commerce, by asserting that "the act made no distinction between classes, and that every obstruction was illegal." And it reiterated that the act "prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states or restricts, in that regard, the liberty of a trader to engage in business."¹

In this connection it is well to note the repeated efforts

¹ From Justice Holmes' dissenting opinion in the Northern Securities case, which was based on the opinion that extraneous restraint only was included in the Sherman act, it is to be inferred that the Court at that time held that not only extraneous, but also subjective restraints, were forbidden. At this time, however, the point was not clearly set forth by the Court.

which have been made in Congress to exclude combinations of labor from inclusion under the act. As noted above, the attempt was first made in 1890. Again, in 1900, the amendment that "Nothing in this act shall be so construed as to apply to trade unions or other labor organizations, organized for the purpose of regulating wages, hours of labor, or other conditions under which labor is performed," was carried in the House by a vote of 260 to 8, and was defeated in the Senate, not on its own merits, but in conjunction with other amendments. It is a matter of speculation how the Senate would have voted on the amendment by itself. Again, in the Sundry Civil Appropriations bill of 1913,¹ a measure passed both houses refusing funds for the prosecution of labor organizations, only to be vetoed by President Taft. Thus, despite determined efforts, the policy dominating the government has been to allow no such classification.²

¹ *Congr. Rec.*, 62nd Congr., 3rd sess. H. R. 28775.

² In the first session of the 63rd Congress, the Sundry Civil Appropriations bill (H. R. 2441) was passed by both Houses. After appropriating money for the enforcement of the anti-trust laws, this bill went on:

"Provided, however, that no part of this money shall be spent in the prosecution of any organization or individual for entering into any combination or agreement having in view the increasing of wages, shortening of hours or bettering the conditions of labor, or for any act done in furtherance thereof, not in itself unlawful. Provided, further, that no part of this appropriation shall be expended for the prosecution of producers of farm products and associations of farmers who coöperate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products,"

President Wilson signed this bill on June 23, 1913, adding, however, a statement to explain his action (*New York Times*, June 24, 1913): "I have signed this bill because I can do so without in fact limiting the opportunity or the power of the Department of Justice to prosecute violations of the law, by whomsoever committed.

"If I could have separated from the rest of the bill the item which authorized the expenditure by the Department of Justice of a special

The manufacture of proprietary medicines under a secret process was held, in the *Dr. Miles Medical Company* case, not to warrant a classification which excluded the defendant from the ban of the law. Again, it was held that no classification was possible whereby restrictions of trade could be permitted.

In the *Standard Oil* case, the Court took up another possible aspect of classification, and declared that no distinction between restraints on self, and restraints on others, was permitted.

The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense but all contracts or acts which theoretically were attempts to monopolize, yet which in practice have come to be considered as in restraint of trade in a broad sense.¹

This meant that a combination which regulated only itself was equally as liable as that which regulated others—

sum of \$300,000 for the prosecution of violations of the anti-trust law, I would have vetoed that item, because it places upon the expenditure a limitation which is, in my opinion, unjustifiable in character and principle. But I could not separate it. I do not understand that the limitation was intended as either an amendment or interpretation of the anti-trust law, but merely as an expression of the opinion of Congress—a very emphatic opinion, backed by an overwhelming majority of the House of Representatives and a large majority of the Senate, but not intended to touch anything but the expenditure of a single small additional fund.

“I can assure the country that this item will neither limit nor in any way embarrass the actions of the Department of Justice. Other appropriations supply the department with abundant funds to enforce the law. The law will be interpreted, in the determination of what the department should do, by independent, and I hope impartial, judgments as to the true and just meaning of substantive statutes of the United States.”

¹ 221 U. S. 59.

that no such distinction could save a combination from the effect of the act. As such, it reverses the decisions in the live-stock cases. The classification there adopted, by the cumulative evidence here presented, may now be considered to be definitely rejected.

Again, in the Union Pacific case, the Court further extended its doctrine that any condition whereby natural competition was suppressed, fell within the act.

Nor do we think it can make any difference that instead of resorting to a holding company, as was done in the Northern Securities case, the controlling interest in the stock of one corporation is transferred to the other. The domination and control, and the power to suppress competition, are acquired in the one case no less than in the other, and the resulting mischief, at which the statute was aimed, is equally effective whichever form is adopted. The statute in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce. This court has repeatedly held this general phraseology embraces all forms of combination, old and new.¹

In these words, the Court refused to accede to a classification of monopolies, whereby the holding of the stock of one corporation by another, rendered valid the resulting monopoly.

Lastly, in the Patten case, the Court reversed the ruling of the circuit court, "that the conspiracy does not belong to the class in which the members are engaged in interstate trade or commerce and agree to suppress competition among themselves," and declared that the ruling could not be sustained, because the act

is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress com-

¹ Dec. 2, 1912.

petition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein.¹

Once more, then, the Court refused to permit a classification which might exclude a combination from the prohibition of the act.

It is clear, then, that no classification except that between interstate and local commerce has ever been permitted. The change comes in the meaning of these terms; during the decade, 1890 to 1900, local commerce was expanded to include as much as possible; since then, the interstate aspect of all commerce has been more and more recognized, and the tendency is to regard all commerce as of this nature.

Every class of combination is to-day included. The importance of intrastate combinations is minimized. The Court has successively interpreted the act to include pools, railroads, labor combinations, holding companies and corporate holdings of stock, and even individuals. Every form which can be invented, constituting a monopoly or restraint of interstate commerce, is comprehended in the prohibition, and practically all commerce is regarded as interstate.

For a classification we have to look, not to the kind of monopoly, but to the kind of restraint of trade.

The standard which should be applied in testing the legality of a restraint of trade

All speakers in the Senate agreed as to the evil of restraint of trade. The manner of determining its existence, however, was left to the judgment of the courts. Only

¹ Jan. 6, 1913.

Senator Sherman stated the fundamental test to be the public good,¹ and he hoped for a liberal interpretation from the Courts.²

The Supreme Court, however, neglected the test of public welfare; largely, no doubt, because of the difficulty of deciding what restraints did or did not, bring about this end. The final results of the legislation were of concern to Congress, not to itself. Instead, it proposed the easier and more immediate test of direct or indirect restraint. This was the test applied in the *Knight* case.³ Such acts as directly restrained interstate commerce were declared unlawful; but on the ground that every contract in some manner might be interpreted to affect interstate commerce, those which did so only indirectly and incidentally were held to be valid. The arbitrary line of distinction between contracts which directly affected commerce, and those which interposed a step, no matter how necessary the effect, was drawn. Under this distinction, the interposition of the manufacture of sugar, between the contract and the entry of sugar into commerce, was the deciding condition.

The decision in the *Freight Association* case was based on the fact that "there can be no doubt that its direct, im-

¹ *Congr. Record*, 1890, vol. xxi, p. 2462.

"All trade and commerce, all agreements and arrangements, all struggles for money or property, must be governed by the universal law that the public good must be the test for all."

² *Ibid.*, p. 2460. "I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to decide in each particular case.

³ 156 U. S. 12. "Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly.

mediate and necessary effect is to put a restraint upon trade or commerce as described in the act.”¹ In this decision, the question whether a restraint was reasonable or not was definitely rejected as irrelevant, on the ground that both were known to the common law, and that the statute evidently included both. In proof of the correctness of this view, the difficulties of deciding whether a certain contract was reasonable or not were held to be so formidable, that Congress might “have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce, regardless of the question whether such agreements were reasonable or the reverse.”²

In the Hopkins case, for the first time the desirability of the use of reason was admitted.³ Yet reasonableness cannot be said to have been made the test of the contract. This test was still held to have been the direct or indirect effect upon interstate commerce; but it was held that reason must be used in deciding under which head a given restraint belonged. However, the use of reason in the decision whether a contract had a direct or indirect effect, seems to free it from the necessity of clinging to the question whether an effect is direct, or whether there is an interposed effect.

In its next case, *Anderson v. United States*, the Court again used reason in its decision. It held that the contract “properly and fairly” regulated the transaction of the business. For these words might well be substituted the word “reasonably”. Making this the basis of its decision, it still held, however, that it was the indirect relation of the

¹ 166 U. S. 341-2.

² 166 U. S. 335.

³ 171 U. S. 600. “The Act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it.”

combination to interstate commerce which was the supreme test.¹

That the use of reason in the decision of the direct or indirect effect of a contract, and not the reasonableness of the contract was the criterion, was forcibly insisted on in the *Addyston* case. The test of validity of a contract was definitely stated as being

where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent, interstate commerce.²

Evidently, the application of this rule required reason on the part of the Court. And yet, the Court agreed with Judge Taft's decision that the reasonableness of the charges of the combination was beside the question, adding that "its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so".³ The case was decided on the finding of the Court that the combination constituted a direct and necessary restraint upon interstate commerce.

In the *Bement* case, which involved the continuation of a patent monopoly, the Court said, "it is true that it has been decided by this Court that the [Sherman] act included any restraint of commerce whether reasonable or unreasonable."⁴ But it then explained that the act did not refer to those restraints arising from "reasonable and legal" con-

¹ 171 U. S. 615. "Where the subject matter of the agreement did not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business. . . ."

² 175 U. S. 228.

³ 175 U. S. 238.

⁴ 186 U. S. 92.

ditions imposed by the owner of a patent. Thus, the adjudication of a restraint, despite the specific denial by the Court, was made to rest on its reasonableness and legality.

Again, in the case of *Montague v. Lowry*, the Court, while holding that the contract directly restrained trade, condemned the terms of membership of the combination as being arbitrary. Here, then, we find a condemnation of the unreasonableness of the contract. But that the Court still clung to its criterion of direct or indirect, however much its decision to which of these classes a contract belonged was based on reason, is further shown by its dicta in the *Northern Securities* case,¹ and the *Loewe v. Lawlor* case.²

President Roosevelt, in the meantime, had arrived at the conclusion that the criterion of monopoly developed by the Court was on a wrong basis.

It has been a misfortune [he wrote] that the national laws on this subject have hitherto been of a negative or prohibitive rather than an affirmative kind, and still more that they have in part sought to prohibit what could not be effectively prohibited, and have in part in their prohibitions confounded what should be allowed and what should not be allowed. It is generally useless to try to prohibit all restraint on competition, whether this restraint be reasonable or unreasonable; and where it is not useless it is generally hurtful.³

Shortly after, the doctrine of reasonableness was clearly applied by the Administration in its decision not to bring a

¹ 193 U. S. 331. "That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy or monopoly upon such trade or commerce."

² 208 U. S. 293. "The act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce."

³ Annual Message, Dec. 5, 1905.

suit against the International Harvester Company. This decision was based on the fact that the company had done nothing in unreasonable restraint of trade.¹ As early as 1906, then, the classification of reasonable or unreasonable restraint was adopted in the Administration policy and thus affected the policy of the general government.

Two years later, in his annual message of 1907, President Roosevelt repeated that the law was not in harmony with actual conditions. "It should be so amended," he urged, "as to forbid only the kind of combination which does harm to the general public," and he explained the criteria which he proposed as follows:

Among the points to be aimed at should be the prohibition of unhealthy competition, such as by rendering service at an actual loss for the purpose of crushing out competition, the prevention of inflation of capital, and the prohibition of a corporation's making exclusive trade with itself a condition of having any trade with itself. Reasonable agreements between, or combinations of, corporations should be permitted, provided they are first submitted to, and approved by, some appointed government body.

In accord with this doctrine, the policy of the Supreme Court was further liberated in 1908, in its decision in the *Shawnee Compress* case. Although it still made much of the question of the directness of the restraint,² still it affirmed that the principle governing the contract was that "the restraint upon one of the parties must not be greater than protection to the other party requires."³

While there is no mistaking the fact that the application

¹ *Supra*, p. 82.

² 209 U. S. 434. The Court reiterated that "it has been decided that not only unreasonable but all direct restraints are prohibited."

³ 209 U. S. 435-6.

of this principle required the use of reason, it cannot be said that the Court at this time definitely adopted this standard.

President Taft, more cautious than his predecessor, yet showed the inadequacy of the test of the directness of the restraint.¹ In a careful analysis of the Supreme Court decisions, he came to the conclusion that while they had refused to read the word "reasonable" into the statute, their distinction between direct and indirect restraints accomplished the same purpose of excluding the many minor and reasonable contracts which were not intended to be included. But later, he condemned the suggestion that the power of deciding whether or not a contract were reasonable should be left to the courts, since it would lead to inconsistent decisions, and would give them a power "approaching the arbitrary." His own suggestion of federal incorporation and regulation, however, seems to demand the exercise of reason to the greatest possible extent, and thereby points the way for the future.

Hereafter, it is interesting to note, the Court broke away from all consideration of the "direct or indirect" effect of contracts. In its next important decision, the *Dr. Miles Medical Co.* case, these words were not even mentioned. In fact, the changed attitude of the Court was clearly shown by Justice Hughes.

With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise, restraints of trade are void as against public policy.²

¹ January 7, 1910, *H. R. Doc.* 484, 61st Congr., 2nd sess.

² 220 U. S. 406.

In this sentence is clearly enunciated for the first time the statement that the reasonableness of the contract, in respect to the parties concerned and the public welfare, is the criterion whereby a contract should be judged. More than this: former standards are definitely discarded as obsolete. Justice Holmes, in a dissenting opinion, stated this point admirably.

There is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the Court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere.¹

The confirmatory evidence that a new doctrine of measurement of a contract or combination was adopted seems scarcely necessary. And yet the fact was denied in the *Standard Oil* decision by Chief Justice White. In this case, by a process of independent thought, he came to the conclusion that the only possible criterion to apply to combinations was that of "reason".² His argument was

¹ 220 U. S. 411.

² 221 U. S. 60. "And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

that the statute was drawn up in the light of economic conditions; that it was broad in its classifications; and that judgment was therefore necessary in its application. The standard to be inferred, none being named, was consequently the standard of reason. Moreover, the Chief Justice later contended that "reason" had always been the standard; that it was only by separating certain statements from the whole context that the opposite could be maintained; and that, in consequence, his announcement was not as revolutionary as it appeared.

This standard of reasonableness was reaffirmed in the American Tobacco Company case, in even more positive language. "The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt."¹ And again, the Chief Justice insisted that he did not depart from any previous decision. That there is much justification for this view is undoubted. But there is also evidence to show that a change of the test for the legality of a restraint has taken place.

But the directness of the restraint has not been completely superseded, as was shown in the Patten case. The defendants insisted that the restraint, if any, was at most an indirect one. But to this Mr. Justice Vandeverter refused to accede. And after explaining the nature of a corner in cotton, he decided that

We regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the states and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent.

¹ 221 U. S. 180.

The conclusion arrived at in this study is that there has been a gradual and continuous increase in the use of "reason" in the determination of the validity of the restraint. It seems clear that at first this question centred about the inevitable result of the contract: when this was primarily to restrain trade, the contract was nullified. The next step was the use of reason in deciding whether the effect of the contract was a direct or an indirect restraint. The present policy is considered to be that the inevitableness of the restraint is held subordinate to its reasonableness, in regard to the public and the covenantees.

This opinion is held despite Chief Justice White's argument that there is no substantial difference between the test of reason, and the test of directness applied with reason, especially in view of the reasonableness of the decisions which applied the directness of the restraint. That the two often coincide, does not render them identical. For when the directness of the restraint is regarded as due to its necessity, and the reasonableness of the restraint is judged with reference to its equity in regard to public and individual welfare, the difference is fundamental.

Conclusions

A summary of the government policies in regard to these questions leads to the following conclusions:

Monopoly is regarded as necessarily an evil. Free competition is the law which must govern all industry. The reasons for the formation of combinations are entirely anti-social; that is, combinations are created solely for the sake of preventing competition and securing a monopoly.

In the condemnation of monopolies the single acts of combinations, taken by themselves, are disregarded. The legality of the acts, judged singly, does not render legal the combination in its entirety. The evil is inherent in the

creation of so large a combination as to be a monopoly. Moreover, all classification of monopolies, made with a view to render some monopoly, through its particular kind of business, or through the form in which it is embodied, immune from prohibition, is forbidden. All monopolies, of whatever kind or form, are to-day included under the act.

The only classification which is permitted is in the kind of restraint of trade. When this, in the judgment of the Court, is unreasonable, in respect to the parties involved and the public welfare, it is prohibited. Only those kinds of restraint which, in these respects, are reasonable, are permitted.

In this connection it is interesting to note that since the adoption of this criterion by the Supreme Court, no restraint has ever been considered a reasonable one: the Court has never specifically declared a contract to be in restraint of trade, and yet of so reasonable a character that it has permitted it. The significance of this, however, must not be overestimated. The Court may decide only those cases brought before it; and it simply means that its judgment thus far has been in accord with the Department of Justice, which brought the case before it to decide.¹

It is for this reason that the policy of the Administration has been of importance. While there are few data² by which this may be judged, it is yet fairly clear that the reasonableness of many contracts and combinations has been judged favorably in the past.

¹ A few cases have been instituted by private parties, with a view to recovering alleged damages. These, however, are exceptional, and affect the truth of the above statement only in a minor degree.

² The fact that suits against many combinations have not been instituted by the government furnishes confirmatory evidence of a negative character.

The validity of all contracts, then, depends on their conforming to the standard of reasonableness, in regard both to the covenantees and the general public; and this reasonableness is subject to the judgment, first, of the Administration, including the President and the Attorney-General, and second, of the Supreme Court.

PART II

In part two are considered those policies of the government more directly concerned with the methods by which monopolies should be treated. These are four in number:

First, the policy in regard to the state or national scope of the trust problem.

Second, the method by which prices should be fixed.

Third, the relation of large size to monopoly.

Fourth, the policy in regard to the enforcement of publicity.

The policy in regard to the state or national scope of the trust problem

Great confidence in the ability of the states to deal with the trust problem was shown in the earlier stages of discussion, and this continued to be a factor even as late as 1903.

In passing the Sherman act, Congress was solicitous of not taking away any power from the states, and even considered an amendment to the effect that "Nothing in this act shall be deemed or held to impair the powers of the several states in respect of any matters in this act mentioned."¹ It is significant that this part of the amendment was never questioned, and that it was rejected only because it was proposed in conjunction with certain other features which were objected to.

¹ *Congr. Rec.*, 1890, vol. xxi, p. 5950.

The bounding of the national power was thus left to the courts, which in the beginning followed the general opinion then current.

In the *Knight* case, the Supreme Court took the narrowest view of the trust question as a national one, evidently believing that the states could and would fill in the gaps. One of its reasons for not nullifying this combination was that if it extended the national power to combinations of production, "comparatively little of business operations and affairs would be left for state control",¹ and it asserted that Congress did not attempt "to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted."

This view was further endorsed by President Cleveland. In his annual message of December 7, 1896, after noting the increase of combinations, and the widespread alarm, he said: ²

If the insufficiencies of existing law can be remedied by further legislation, it should be done. The fact must be recognized, however, that all federal legislation on this subject may fall short of its purpose because of inherent obstacles and also because of the complex character of our governmental system, which, while making the federal authority supreme within its sphere, has carefully limited that sphere by metes and bounds that cannot be transgressed. The decision of our highest court on this precise question renders it quite doubtful whether the evils of trusts and monopolies can be adequately treated through federal action unless they seek directly and purposely to include in their objects transportation or intercourse be-

¹ 156 U. S. 16.

² *Richardson: Messages and Papers of the Presidents*, vol. ix, pp. 744-5.

tween states or between the United States and foreign countries.

It does not follow, however, that this is the limit of the remedy that may be applied. Even though it may be found that federal authority is not broad enough to fully reach the case, there can be no doubt of the power of the several states to act effectively in the premises, and there should be no reason to doubt their willingness to judiciously exercise such power.

The Court soon was led, however, in the Freight Association case, into a partial recognition of the national importance of a combination; through the very evident national scope of railroads, and the similarity of the effect of combinations of railroads and of industrial combinations,¹ it was forced by logic to broaden its views.

And yet the point was not clearly set forth. The Court dwelt at length on the essential differences between railroads and manufactures.

A further step in the direction of the local point of view was the next to be recorded. In the Hopkins case, an agreement among the traders to abide by certain rules was held to be a local matter. The Court quoted with approval from a decision of Mr. Justice Field,² "should there be any gross injustice in the rate of tolls fixed, it would not, in our system of government, remain long uncorrected," but, since this would affect interstate commerce only indirectly, it was not a question for the Supreme Court to settle, since "whether the charges are reasonable or not is a question primarily of local law".

¹ 166 U. S. 324. "The results naturally flowing from a contract or combination in restraint of trade or commerce when entered into by a manufacturing or trading company such as above stated while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common."

² *Sands v. Manistee River Improvement Co.*, 123 U. S. 288-94-5.

The first definitive step away from the treatment of the trusts as a state question and toward federal regulation was made by President McKinley in his annual message of December 5, 1899.¹ After calling attention to the enormously rapid spread of combination during that year, he stated that Mr. Cleveland's faith in the ability of the states to cope with the problem had been shown to be unfounded, and that accordingly it was the duty of Congress so to extend the present law as to make it effective.

The first case in which the Court adopted unequivocally the national point of view was that of *Northern Securities Co. v. United States*. The view that the government had no right to interfere with the acts of corporations which were permitted by their state charters was insistently forced upon the Court and repeatedly denied. Again and again,

¹ It is interesting to note that in New York State [*Senate Document*, 1897, no. 40] the Lexow commission called attention to the inability of the states to deal adequately with the trusts, and observed: "It is unfortunate in this aspect of the case that the limitations upon the federal power as determined by the United States Supreme Court practically annul the force of the so-called 'Sherman anti-trust law' because it is clear that federal authority, in view of the considerations above stated, would be the only jurisdiction with adequate power to afford a complete remedy." And they concluded that "it is obvious that the federal courts have placed so narrow a construction upon the limits of their authority that, in the absence of constitutional amendment little or no relief may be expected from that quarter, unless the Supreme Court of the United States shall greatly modify the conclusions above referred to."

That this, however, was not yet the accepted policy of the government, is shown by the following extract from the report of the Attorney-General, Mr. Griggs, in 1899: "There is no question of the right and power of every state to make and enforce laws in restraint of monopoly; that is the normal and proper sphere of state autonomy; while the United States, not having been formed as a government for the regulation of the internal affairs and businesses of the states, is limited in its authority to the regulation of that kind of business described as commerce between the states and with foreign nations."

the Court replied to these arguments that the regulation of interstate commerce was under the control of the federal government; that Congress had the power to enact, and the Court the power to enforce, the laws for its regulation. All acts of the states in this field were held to be subordinate to the acts of Congress.

The issue was squarely presented and squarely met. Hereafter, there could be no question that the policy of the Supreme Court was to recognize the problem of combination as one of national importance and for national treatment.

So far as the Court was concerned, the issue was not raised in any subsequent cases. The recognition of this policy has, however, resulted in several proposals from the other branches of the government.

President Roosevelt followed in his predecessor's footsteps in urging the national character of the question. It was in recognition of this fact that, in his first annual message in 1901, he proposed publicity as "the only sure remedy which we can now invoke". Having achieved his purpose, as it seemed at the time, in the formation of the Bureau of Corporations, he pursued his policy still further.

In his annual message of 1905 he said:

The makers of our national constitution provided especially that the regulation of interstate commerce should come within the sphere of the general government. The arguments in favor of their taking this stand were even then overwhelming. But they are far stronger to-day, in view of the enormous development of great business agencies, usually corporate in form. Experience has shown conclusively that it is useless to try to get any adequate regulation and supervision of these great corporations by state action. Such regulation and supervision can only be effectually exercised by a sovereign whose jurisdiction is coextensive with the field of work of the corporations—that is, by the national government.

And following out this idea, he recommended, "such adequate supervision and regulation as will prevent any restriction of competition from being to the detriment of the public", and he concluded that "until the national government obtains, in some manner which the wisdom of the Congress may suggest, proper control over the big corporations engaged in interstate commerce—that is, over the great majority of the big corporations—it will be impossible to deal adequately with these evils."

Having failed in his attempt to arouse Congress, he returned to the subject in his annual message of 1907, with more specific suggestions. Reiterating the national character of the trust question, he now suggested an increase of publicity, a federal commission, in place of the courts, to administer the law, and federal incorporation for companies engaged in interstate commerce. His last message, in 1908, was but an announcement of the fixity of his views.

President Taft embodied his views on the trust question in a special message on January 7, 1910. Taking the national aspect for granted, after a careful analysis of the situation, he recommended federal incorporation for all industries doing interstate business, so as to bring them all under the regulation of the federal government. This should include the supervision of security issues, the receipt of reports at regular intervals, and the regulation of intercorporate holding of stock. His subsequent messages were confined to a repetition of this plan of action.

The policy of the government in regard to the federal nature of the trust question is thus seen to have undergone a change. Beginning with a sharp cleavage between federal and states' rights of supervision, there has been a constant movement towards the treatment of the question as one of national scope. This view has been accepted by two branches of the government; the attitude of Congress has

been negative, rather than aggressive in either direction; and should it adopt federal incorporation, it would come in line with the rest of the government.

We may conclude¹ that to-day the policy of the government is that of the Supreme Court; and that it is distinctly to regard the problem as one of national character.²

The method by which prices should be fixed

In the congressional debates of 1890, no hint of the possibility that the government had the power to regulate prices was given. In fact, this may be considered as contrary to the spirit of the act, whose main purpose was the insurance of competition. Through this means, indirectly, prices may be said to have been regulated, but not by a direct act of government. However the significance of changes in prices must not be minimized.³ It was the alleged increases which called forth the most vehement speeches made in Congress. In fact, the effect of combinations on prices was the first to be felt by the public. In this connection, Mr. George said: "They increase beyond reason the cost of the necessities of life and business, and they decrease the cost of the raw material, the farm products of the country.

¹The decision of Attorney-General Wickersham [*supra*, p. 89] to drop the suit against the New York, New Haven and Hartford Railroad on account of its consolidation with the Boston and Maine Railroad, because a statute of Massachusetts, which was the community most directly affected, expressly authorized this consolidation, constitutes an exception to this statement.

²With the coming into power of the Democratic party, and in view of the well-known states' rights doctrines of the new President, the policy of the government in this respect seems likely to undergo a change in the near future.

³The original Sherman bill particularly prohibited increase of price, allowing to any person "the full consideration or sum paid by him for any goods, wares and merchandise included in or advanced in price by said combination."

They regulate prices at their will.”¹ Senator Pugh also spoke of the “oppressive and merciless character of the evils resulting directly to consumers”.²

By the acceptance of the Reagan amendment,³ the Senate showed that among the evils which it imputed to trusts, were the alteration of prices, and the fixing of a standard price.

Perhaps the words of Senator Edmunds are the most significant in showing the trend of opinion. “However seductive they [the trusts] may appear in lowering prices to the consumer for the time being,” he declared, “all human experience and all human philosophy has proved that they are destructive of the public welfare and come to be tyrannies, grinding tyrannies.”⁴

Most of the discussion in the House was devoted to other phases of the question. Mr. Fithian, however, stated one of the greatest evils of trusts to be “that they enhance the price of commodities to the people beyond an honest profit.”⁵ In answering a series of questions, Mr. Culberson contended that among the most serious evils of trusts were temporary changes in price, whether a raise to extort money from consumers, or a fall to drive out competitors.

It may then be concluded that Congress had distinctly in mind the evils of alterations in prices; and that it proposed as a remedy, not direct, regulating action by the government, but automatic regulation by a restoration of competition.

In the Knight case, however, the effect of prices was specifically set aside by the Supreme Court. A change might be the result of a combination; and yet, the Court

¹ *Congr. Rec.*, 1890, p. 2456.

² *Ibid.*, p. 2358.

⁴ *Ibid.*, p. 2726.

³ *Ibid.*, p. 2611.

⁵ *Ibid.*, p. 4101.

said, it would be an indirect result, and not that by which the combination should be judged. In other words, the actual prices paid were a matter with which the government had no concern.¹

Shortly after, however, the Court prepared the way for giving greater consideration to actual prices. It had pointed out that an increase of price was no condemnation; in the Freight Association case it held that a decrease in price was not an adequate excuse for the existence of a combination. Social harms, such as the reduction of independent men to wage-earners, and changes in industry which resulted in the pauperization of formerly self-supporting men, might more than counterbalance a reduction of price, even though that reduction were gained by a decrease in cost. It was the ability of the combination to dictate prices which constituted the harm.² "In this light," the Court concluded, "it is not material that the price of an article may be lowered."

In the Addyston case, the Court dealt even more specifically with prices. The raising of the price, and its effect on commerce was made the crucial factor; because the natural result of this was to restrain commerce, that combination which made this possible was held to be unlawful. In the language of the Court: "The higher price would operate as a direct restraint upon the trade and therefore any contract or combination which enhanced the price

¹ 156 U. S. 16. "Contracts, combinations or conspiracies to control . . . production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result . . . and would not determine the object of the contract, combination or conspiracy."

² 166 U. S. 324. "Nor is it for the substantial interest of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital."

might in some degree restrain the trade in that article."¹ Moreover, the ability of a corporation to charge unreasonable prices, even though it did not do so, was held to warrant interference by the government. In this connection, the Court insisted that, even though prices were reasonable, they agreed with Judge Taft's verdict that the ability to fix prices was sufficient for condemnation.²

The decision in *Connolly v. Union Sewer Pipe Co.*, however, minimized the effect of prices. The Court declared that the contract creating the combination had nothing to do with the contract of purchase, and that since the price was not fixed by the combination, but by competition, the Court was not interested in the amount.

The case of *Chattanooga Foundry and Pipe Works v. City of Atlanta* was decided on the justness of the price paid by the city to the company for certain pipe which it had bought. It was because of the decision of the Court that this price was arbitrary and unreasonable and had been fixed by means of a monopoly, that it allowed the city triple damages for the excess over the just price.

Again, in the case of the *Continental Wall Paper Company v. Voight*, the Court followed this same principle in

¹ 175 U. S. 245.

² 175 U. S. 237, 238. "It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in 'pay' territory were reasonable. A great many affidavits of purchasers of pipe in 'pay' territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that in their opinion the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so."

refusing to enforce a contract which involved a price arbitrarily assigned by a combination, with the words:

the account in suit was made up, as to prices and terms of sale, not upon the basis of an independent, collateral contract for goods sold and delivered, but with direct reference to, in conformity with and for the object of enforcing the agreements that constituted, or out of which came, the illegal combination whose business is carried on under the name of the Continental Wall Paper Company.¹

It was because the terms of sale and price were fixed by other laws than those of free competition, that the Court refused to enforce payment under this contract. And it distinguished this case from the *Connolly* case, on the ground that in the latter, the combination had not fixed the price, but had been governed in its sale by the force of competition.

The nature of the contracts in the *Dr. Miles Medical Company* case was described as

a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition.²

And later, reverting to this aspect of the case, the Court decided that there was no difference between a contract entered between a manufacturer and each dealer, and a combination of dealers, to fix the price. As one was harmful, so also was the other. Again, then, it was the fixing of prices by a combination that was condemned.

In deciding against the *Standard Oil Company*, the Court

¹ 212 U. S. 255.

² 220 U. S. 399.

clearly showed that it was influenced by the conduct of those bringing about the combination—among other methods being those of price cutting and rebates, and by the “enormous and unreasonable profits”¹ of that business. These profits were evidently ascribed to the ability of the company to name its prices independently of the forces of competition.

And in the Union Pacific case, the Court once more refused to permit a consolidation which had only the power to fix prices, and affect competition, without actually having done so.

Nor does it make any difference that rates for the time being may not be raised, and much money be spent in improvements after the combination is effected. It is the scope of such combinations and the power to suppress or stifle competition or create monopoly which determine the applicability of the act.²

Lastly, in the Patten case, the Court again refused to permit of any conspiracy which affected prices, however innocent it might otherwise be.

It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.³

From these facts, it is concluded that the policy of the government has been to allow price regulation only through the play of competitive forces. No move has ever been

¹ 221 U. S. 42-43.

² Dec. 2, 1912.

³ Jan. 6, 1913.

contemplated in the industrial field of a determination of prices by government mandate; and invariably, the fixing, or even the ability to fix prices by any combination arbitrarily, and not with reference to competition, has been prevented. And the fixing of prices at a higher level is not the only consideration here entertained: even the lowering of prices, if it is accomplished by other means than the play of free competition, is condemned.

In the field of railroads, there is something illogical in the position of the government. With a commission to regulate rates, the Supreme Court nevertheless has prevented certain consolidations, on the ground that they gave the power to regulate competition: that is conditions, rather than rates. But there is no regulating force in the industrial field, and here we find a steadfast, consistent policy pursued of preventing the fixing of prices by any force whatsoever except that of free competition.

The relation of large size to monopoly

A limitation of the size of a corporation has seemed to some people the obvious way of preventing monopoly. This might be accompanied either by limiting the actual, physical amount of capital to be employed under one management in any industry, or in limiting the percentage, either of capital or gross business, of one corporation as compared to the total of the country in that industry.

No such scheme seems to have been considered in 1890. Senator Sherman, indeed, stated that it was not his intention to "cripple combinations of capital and labor; the formation of partnerships or corporations; but only to prevent combinations made with a view to prevent competition".¹ Later, in his speech, he seems to hint at some limitation when he speaks of the evils which such concen-

¹ *Congr. Rec.*, 1890, vol. xxi, p. 2456.

tration of power gives to those enterprises which "are not satisfied with partnerships or corporations competing with each other, and which have invented a new form of combination commonly called 'Trusts' that seek to . . . avoid competition". Senator George likewise hinted at some limitation of size or power; but it does not seem to have been marked by any quantum of capital.¹ By the adoption of the Reagan substitute in the Senate,² this body placed itself on record, among other things, against creating a monopoly in any industry; such monopoly would seem necessarily to mean either 100 per cent or some percentage of the total industry; but no ratio was fixed.

In the House but one speaker touched on this phase of the question. Mr. Culberson stated,³ in opening the discussion in this body, that "just what combinations would be included in the bill would not be known until the courts have construed and interpreted this question". On the whole then, it may be said, that some limit of size was in the mind of Congress, although this limit was not fixed by any standard, but left to the judgment of the courts.

In its first decision, the Supreme Court decided what Congress had meant. In the *Knight* case, the Court declared that "Congress did not attempt . . . to limit or restrict the rights of corporations created by the states . . . in the acquisition, control or disposition of property."⁴

But in the *Freight Association* case, the Court again took up the influence of size. Although a combination might reduce price through lowering cost, still, it said, "Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have

¹ *Congr. Rec.*, 1890, p. 2598.

² *Ibid.*, p. 4089.

³ *Ibid.*, p. 2611.

⁴ 156 U. S. 16.

been spent therein. . ." ¹ Again, however, we find but a hint at the effect of "bigness" and no application of it as a standard.

The size of the Addyston combination seems to have been a factor in the decision of the Court to dissolve it. The reasonableness of the charges made by the combination was declared beside the point, since "its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so". ²

In the case of *Montague v. Lowry*, the Court refused to consider the argument of the Tile Association that the amount of the trade was negligible. The amount, Justice Peckham declared, made no difference. It was the fact of restraint that decided the question. The business might materially change through the restraint; in fact, it would tend to do so, through the predominance of the Association. ³

Mr. Taft, in his special message to Congress on January 7, 1910, after a careful review of the Sherman act, concluded that "we must infer that the evil aimed at was not the mere bigness of the enterprise, but it was the aggregation of capital and plants with the express or implied intent to restrain interstate or foreign trade, or to monopolize it in whole or in part." ⁴

In the *Standard Oil* case, the Court gave great weight to the size of the combination. While not applying this in any strict sense, still it held that the unification of so vast a power and control in the New Jersey corporation caused a *prima facie* presumption of a combination in restraint of trade.

In the *Tobacco* case, on the other hand, the question of

¹ 166 U. S. 323.

² 175 U. S. 238.

³ 93 U. S. 46.

⁴ *H. R. Doc.*, no. 484, 61st Congr., 2nd sess.

size was entirely set aside. While the Court decided that the combination fell under the prohibition of the statute, it laid great stress on excluding from consideration the physical size of the company, and its large power in the tobacco business.¹

This question came up for consideration again in the Union Pacific merger case, and this time the Court seemed to swing back to the point of view of the Standard Oil decision.

Nor does it make any difference that rates for the time being may not be raised and much money spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.

In other words, weight is attached to the size and power of the combination, in determining whether or not it is included within the scope of the Sherman act. It is impossible to ascertain whether or not the same judgment would have been arrived at, had the scope of the combination been less; but it is certain that this fact played a part in the decision of the Court.²

It is evidently difficult to decide what is the policy of the government in regard to size. As far as Congress is concerned, it left the matter to the courts, and we have seen how, even in its latest decisions, the Supreme Court has vacillated. Perhaps its policy in this regard will be clari-

¹ 221 U. S. 182. "We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists."

² Dec. 2, 1912.

fied by the decision in the Steel trust suit, in which, if anywhere, the question of mere "bigness" should assume controlling importance. The most that can be said is that size has been a definite factor in the past, though an uncertain one.

In this respect, the report of the Stanley committee in 1912 may show the tendency of the future.¹

The policy in regard to the enforcement of publicity

The question of making publicity of the affairs of industrial corporations a policy of the government was first considered in 1900. In commenting on a proposed amendment to the Sherman act, the majority of the judiciary committee (Republicans) said:

We have also considered the various suggestions that have been made relative to publicity, and while it is perhaps probable that some advantages might result therefrom, we are of the opinion that the inconvenience and disturbance to legitimate industry and business would be very much in excess of any advantage that might reasonably be expected from such legislation, and therefore do not deem it wise to recommend any such legislation.²

The Democratic minority proposed an amendment to provide for publicity by forcing all companies engaged in interstate commerce to file with the Secretary of State all the facts pertaining to themselves, including a résumé of

¹ *H. Report*, no. 1127, 62nd Congr., 2nd sess., p. 214. Section 214 of the proposed bill provided that whenever in a suit it appeared that a combination controlled over 30 per cent. in value of the total quantity sold of the articles in which its business was engaged, in the United States, or even in that part of the United States in which its business extended, there should be a rebuttable presumption that this combination was in unreasonable restraint of trade.

² *H. Rept.*, no. 1506, 56th Congr., 1st sess.

their business, capitalization, dividends, and surplus. This modest demand was, however, defeated on June 2, 1900, with the other amendments which the minority proposed, by a party vote in the House. At this time, then, publicity was in no way a part of the government policy.

In 1903, however, a change came about. In his message of December, 1901, President Roosevelt had already urged the need of publicity. "The first essential in determining how to deal with the great industrial combinations is knowledge of the facts—publicity. . . . Publicity is the only sure remedy which we can now invoke." And in his message of December, 1902, he proclaimed himself confirmed in this opinion, and added: "Publicity can do no harm to the honest corporation; and we need not be overtender about sparing the dishonest corporation."

Following this lead, Mr. Littlefield proposed, with many other amendments, one which definitely adopted the policy of publicity.¹ He explained at length its provisions, which provided in detail for the manner of making returns and reports, the punishment for false reports, and a commission for regulating and investigating the affairs of the interstate corporations.² These measures passed the House without a dissenting vote;³ but the Senate at this time refused to consider them.⁴ In this session, nevertheless, a really important step, and one which definitely involved the government in this policy, was consummated. This was the creation of the Bureau of Corporations, as part of the new Department of Commerce and Labor. The Bureau, indeed, was given entirely inadequate powers. No systematic scheme of publicity was attempted; but at least a beginning was made.

¹ *Congr. Rec.*, 57th Congr., 2nd sess., H. R. 17.

² *Congr. Rec.*, 57th Congr., 2nd sess., p. 1845.

³ *Ibid.*, p. 1915.

⁴ *Ibid.*, p. 2792.

In his first annual report, the commissioner, Mr. Garfield, outlined a very conservative policy of investigation, and publication through the President, with many assurances of safety to legitimate business, and secrecy as to the methods employed, if they were considered harmless. In his next annual report,¹ Mr. Garfield declared himself confirmed in his policies.

Upon only one point can it be said that public opinion was fairly clear and unanimous, and that point was the desire for "publicity"—in other words, the desire for information. . . . The policy of the bureau has been framed in accordance with this demand.

But that the Bureau itself felt its inefficiency is shown by subsequent reports. In his report of June 30, 1908, Mr. Smith, speaking of publicity, said:

The Bureau of Corporations has been working on this line for five years. Its experience has shown what such publicity will do. When the great system of secret and semi-secret railway discriminations enjoyed by the Standard Oil Company was made public by the bureau in 1906, the railroads concerned therein at once voluntarily canceled every rate thus criticised, as illegal. Again and again the mere exposure of improper business methods has led to their abandonment without any further action. But now the work of the Bureau of Corporations is necessarily restricted to a comparatively small scope—and he outlined a broad plan for federal supervision and control.

And in the last report, dated February 22, 1913, Mr. Conant, in reviewing the ten years' accomplishments of the Bureau, stated that, in view of the great potentialities of publicity

¹ *Report of the Commissioner of Corporations*, 1905.

it seems important to point out, therefore, that the publicity thus far secured by the bureau has been hampered and restricted by the limitations of the organic act itself, and that the results are by no means a fair measure of what might reasonably be expected from publicity under a broader statute.

The Bureau has reported on a number of industries.¹ In some cases, the publication of its findings has been sufficient to induce a change in business methods; in others, their report has led to prosecutions by the Attorney-General.

At the end of its first year, the Bureau had 64 employees. The number gradually increased in the following years, until the high mark of 131 employees was reached in 1908. Since then the number has varied between 111 and 127.² The expenses of the Bureau have likewise increased from \$118,866.11 in the first year, gradually up to \$220,381.67 in 1908-1909, since when they have been somewhat below this figure.³

It is evident that, so far as the Bureau of Corporations is concerned, the policy of publicity is inefficient, and is not

¹Cotton Exchanges, International Harvester, Iron and Steel, Lumber, Oil, Provision (beef), Tobacco, Waterpower, Water and Canal Transportation, Cotton. Also investigations on State and Federal Incorporation Laws, Taxation of Corporations, Employers Liability and Workmen's Compensation, and Patents.

²*Reports of the Commissioner of Corporations:*

1905 = 74	1908 = 131
1906 = 73	1909 = 111
1907 = 97	1910 = 119
1911 = 127	

³*Annual Report, June 30, 1912:*

1904 (½ yr.) = \$59,765.21	1908 = \$206,972.61
1905 = \$118,866.11	1909 = 220,381.67
1906 = 136,356.40	1910 = 202,583.28
1907 = 140,620.96	1911 = 195,221.93
1912 = \$209,134.89	
1912 (½ yr.) = \$107,250.14	

tending to be less so. Publicity can scarcely be considered more than an experiment, rather than a definite governmental policy.

After urging Congress to consider the evils of the industrial situation for several years, Mr. Roosevelt finally, in his message of December, 1907, made his own recommendations. There should be, he insisted, greater supervisory power on the part of the government, "accompanied by provision for the compulsory publication of accounts and the subjection of books and papers to the inspection of the government officials." And he added, "A beginning has already been made by the establishment of the Bureau of Corporations." And then he urged federal incorporation for interstate business, administered by a special commission. "Provision should also be made for complete publicity in all matters affecting the public, and complete protection to the investing public and the shareholders in the matter of issuing corporate securities."

Later, in a special message on March 25, 1908, President Roosevelt recommended the immediate enactment of a provision for the filing of all contracts with the Bureau of Corporations.¹

President Taft, in his special message of January 7, 1910,² urged federal incorporation for all interstate business. This, he explained, would bring all such business under the control of the government; issues of securities would be supervised; reports would be made at regular intervals; holding of stock in other companies would be regulated. And later, in his annual message of December, 1911, he advocated the appointment of a commission in order to administer the law properly.

¹ *Senate Doc.* no. 406, 60th Congr., 1st sess.

² *H. R. Doc.* no. 484, 61st Congr., 2nd sess.

From the above sentences it is clear that the executive has taken a position in advance of Congress as regards the desirability of publicity. Its demand has been for complete, systematic publicity on the part of all interstate companies. In this respect, however, the policy of the government has been dictated by Congress. It has been characterized by random investigations, delving freely, it is true, and frequently into the affairs of particular combinations, but not following any general or systematic method. This has also been the plan followed by the Bureau of Corporations. Without power to enforce an all-inclusive policy, it has performed a great and useful function by investigating and publishing the conditions of certain industries.

The policy of the government, then, may be summed up as one of sporadic, casual publicity, with a tendency to increase the number and scope of the investigations.

Conclusions

A consideration of these aspects of the government policy leads to the conclusion that it has been chiefly negative, with the single exception of the very definite treatment of the trust problem as one of national, rather than state, scope. The other three phases here examined, however, are of an indecisive character. It is true, the government has permitted no power to fix prices in an arbitrary manner; but it has never adopted a positive attitude towards this question. The same is even more true of the other two questions: size is a very uncertain factor, both as a criterion of monopoly and as a definite standard for prohibition; enforcement of publicity, also, is unmethodical and spasmodic.

It is concluded, therefore, that the government shows no evidence of ever having undertaken seriously a study of the trust problem, such as would be necessary for the for-

mation of a definite and enlightened policy. Broadly speaking, Congress has accomplished nothing of note since the passage of the act of 1890; the Executive has been largely impotent; and the Supreme Court, while displaying a growing, and finally well-nigh complete, grasp of the economic problems involved, has because of limitations inherent in its nature and functions, been unable to cope in a constructive way with the vast problem which confronts the country.

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VITA

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